Supreme Court, U.S.
FILED
03-1722 JUN 25 2004

No.

IN THE

Supreme Court of the United States

VERIZON INTERNET SERVICES, INC.,

Cross-Petitioner,

v.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether the issuance and enforcement of binding judicial process pursuant to 17 U.S.C. § 512(h), outside the context of a "case or controversy," violates Article III of the United States Constitution and fundamental principles of the constitutionally mandated separation of powers.

PARTIES TO THE PROCEEDING

Cross-respondent Recording Industry Association of America, Inc. was the appellee below. Cross-petitioner Verizon Internet Services Inc. was the appellant. The United States intervened pursuant to 28 U.S.C. § 2403 solely to defend the constitutionality of the Digital Millennium Copyright Act.

RULE 29.6 DISCLOSURE

Cross-petitioner is a wholly owned subsidiary of Bell Atlantic Entertainment and Information Services Group, Inc. Bell Atlantic Entertainment and Information Services Group, Inc. is a wholly owned subsidiary of Bell Atlantic Investment Development Corporation, which is a wholly owned subsidiary of Verizon Investments Inc. Verizon Investments Inc. is a wholly owned subsidiary of Verizon Communications Inc., a publicly held corporation. Verizon Communications Inc. does not have a parent company, and no publicly held company has a ten-percent or greater interest in it.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Rule 29.6 Disclosure	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	xiv
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
A. The Importance of Anonymous Speech and Association to the Growth of the Internet.	4
B. The Traditional "John Doe" Lawsuit	7
C. The DMCA's Novel Subpoena Provision	9
D. The Subpoenas at Issue in These Consolidated Enforcement Proceedings	11
E. The Proceedings Below	11
1. The District Court's Decisions	11
2. The Court of Appeals' Reversal of the District Court on Statutory Grounds	13

Contents

Page

Reasons for Granting the Conditional Cross-Petition 15

I. If This Court Grants RIAA's Petition, It Should Also Consider The Alternative Article III Ground For Affirmance Of The D.C. Circuit's Judgment Below. 15

A. Issuance of the DMCA's Novel Subpoena Device Outside of a Pending Case or Controversy Violates Article III and Conflicts with this Court's Precedent. .. 15

B. These Subpoena Matters Squarely Present the Important Question Whether the DMCA's Novel Subpoena Device Can Be Applied Outside of a Pending Case or Controversy. 27

C. This Court Should Consider the Article III and Separation of Powers Issues Regardless of Whether It Grants this Conditional Cross-Petition. 30

Conclusion 30

TABLE OF CITED AUTHORITIES

CASES *Page*

AOL v. John Does 1-30,
No. 03-472-A (E.D.Va. filed Apr. 14, 2003) 8

Arizona v. California,
292 U.S. 341 (1934) 26

Ash v. Cort,
512 F.2d 909 (3d Cir. 1975) 26

Barwood, Inc. v. District of Columbia,
202 F.3d 290 (D.C. Cir. 2000) 16, 23

Buckley v. Valeo,
424 U.S. 1 (1976) 2, 22

Cheney v. United States District Court for the District of Columbia, No. 03-475
(U.S. June 24, 2004) 22

Doe v. Myjil,
2 Va. Colonial Dec. B 161, 1735 WL 1 (Va. Gen. Ct. Oct. 1735) 8

Gardner v. Nike, Inc.,
279 F.3d 774 (9th Cir. 2002) 10

Gordon v. United States,
117 U.S. Appx. 697 (1864) 15

Green v. Campagnia Generale Italiana di Navigation,
82 F.490 (S.D.N.Y. 1897) 26

Cited Authorities

Page

Hayburn's Case,
2 U.S. (2 Dall.) 408 (1792) 15, 17, 20

Hoffmann-La Roche, Inc. v. Sperling,
493 U.S. 165 (1989) 2, 15, 16, 17

Houston Business Journal, Inc. v. Office of Comptroller of Currency,
86 F.3d 1208 (D.C. Cir. 1996) 16, 19, 23

Immunomedics, Inc. v. Doe,
775 A.2d 773 (N.J. Super. Ct. App. Div. 2001) ... 8

Interstate Commerce Commission v. Brimson,
154 U.S. 447 (1894) 13, 20

Irving v. Carpentier,
11 P. 391 (Cal. 1886) 8

La Societe Metro Cash & Carry France v. Time Warner Cable,
No. CV030197400S, 2003 Conn. Super. LEXIS 3302 (Dec. 2) 8

Lloyd v. Lawrence,
60 F.R.D. 116 (S.D. Tex. 1973) 22

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 21

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 3, 15, 20

Cited Authorities

	Page
In re Marc Rich & Co., 707 F.2d 663 (2d Cir. 1983)	23
McCook Metals LLC v. Alcoa, 249 F.3d 330 (4th Cir. 2001)	24
MGM Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *appeal pending*, No. 03-55894 (9th Cir.)	5
Microsoft Corp. v. Does 1-50, No. C04-0516C (W.D. Wash. Apr. 20, 2004)	8
Mistretta v. United States, 488 U.S. 361 (1989)	2
Muskrat v. United States, 219 U.S. 346 (1911)	15
NAACP v. Alabama, 357 U.S. 449 (1958)	6
Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994)	29
Pacific Bell Internet Services v. RIAA, No. 03-CV-3560-JL (N.D. Cal.)	1
Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069 (D.S.D. 2001)	5

Cited Authorities

Page

Pennsylvania Mutual Life Insurance Co. v. United States,
68 F.3d 1371 (D.C. Cir. 1995) 25

Reno v. ACLU,
521 U.S. 844 (1997) 5

RIAA v. Charter Communications, Inc.,
No. 03-3802 (8th Cir.) 1

Rossi v. Motion Picture Association of America,
No. Civ. 02-00239, 2003 U.S. Dist. LEXIS 1864
(D. Haw. Apr. 29) *appeal pending*, No. 03-16034
(9th Cir.) 10

Sheehan v. Doyle,
513 F.2d 895 (1st Cir. 1975) 24

In re Skylight Shipping Corp.,
No. 99-1290, 1999 WL 1293472
(E.D. La. July 9) 25

In re Simon,
297 F. 942 (2d Cir. 1924) 19

Stearns v. Doe,
78 Mass. 482 (1859) 8

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 3, 21

Cited Authorities

	Page
In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000), *rev'd on other grounds, America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001) ..	8-9
In re Subpoena to University of North Carolina, No. 1:03mc138 (M.D.N.C.)	1
In re Subpoena to North Carolina State University, No. 1:03mc139 (M.D.N.C.)	1
Talley v. California, 362 U.S. 60 (1960)	6
United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544 (1996)	21
United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988)	*passim*
United States v. Ferreira, 54 U.S. (13 How.) 40 (1851)	15, 20
United States v. Morton Salt Co., 338 U.S. 632 (1950)	*passim*
Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979)	29
Yale Todd's Case, *printed at* 54 U.S. (13 How.) 52 (1851)	15

Cited Authorities

Page

CONSTITUTION, STATUTES AND RULES

U.S. Const. art. III ..... *passim*

2 U.S.C. § 338 24

7 U.S.C. § 2354(a) 24

17 U.S.C. § 106 10

17 U.S.C. § 411 10

17 U.S.C. § 501(b) 10

17 U.S.C. § 512(c) 9, 10

17 U.S.C. § 512(h) ..... *passim*

28 U.S.C. § 956 22

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2403 ii

29 U.S.C. § 621 16

29 U.S.C. § 1132(c) 13

35 U.S.C. § 24 24

45 U.S.C. § 157(h) 24

47 U.S.C. § 230(a) 4

Cited Authorities

	Page
47 U.S.C. § 230(b)	5
Fed. R. Civ. P. 11	10
Fed. R. Civ. P. 27	*passim*
Fed. R. Civ. P. 37	24
Fed. R. Civ. P. 45(e)	11
Fed. R. Civ. P. 82	24
Ala. R. Civ. P. 9(h)	8
Ariz. R. Civ. P. 10(f)	8
Haw. R. Civ. P . 17(d)	8
Idaho R. Civ. P. 10(a)(4)	8
Ind. R. Trial P. 17(F)	8
Minn. R. Civ. P. 9.08	8
Miss. R. Civ. P. 9(h)	8
N.D. R. Civ. P. 9(h)	8
Nev. R. Civ. P. 10(a)	8
Ohio R. Civ. P. 15(D)	8
Or. R. Civ. P. 20(H)	8

Cited Authorities

	Page
P.R. R. Civ. P. 15.4	8
S.C.R. Civ. P. 10(a)(1)	8
S.D.R. Civ. P. 15-6-9(h)	8
Utah R. Civ. P. 9(a)(2)	8
Wash. Super. Ct. R. Civ. P. 10(a)(2)	8
Wyo. R. Civ. P. 17(d)	8

LEGISLATIVE MATERIALS

S. Rep. No. 105-190 (1998) 5

MISCELLANEOUS

Advisory Committee Notes to Fed. R. Civ. P. Rule 45 (1937) 19

Frank W. Grinnel, *John Doe and Richard Roe – Their Portraits, Their History, Their Services in the Advancement of Justice Through the Rulemaking Power of the Courts*, Mass. L.Q., Aug. 1935 8

Jonathan Krim, *A Story of Piracy and Privacy*, Wash. Post, Sept. 5, 2002 25

3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright (2004) 10

Cited Authorities

	Page
Proprietary and Security Notice, *at* http://www.supremecourtus.gov/security.html (visited June 21, 2004)	6
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Robert L. Stern, *et al.*, Supreme Court Practice (8th ed. 2002)	3
Verizon, Music Industry Argue Over Internet Privacy, Bloomberg News (Oct. 4, 2002)	25
8 Charles A. Wright, *et al.*, Federal Practice and Procedure (3d ed. 1998)	25

TABLE OF APPENDICES

Page

Appendix A — Article III Of The United States Constitution 1a

Appendix B — Transcript Of September 16, 2003 Oral Argument At The United States Court Of Appeals For The District Of Columbia Circuit 3a

Verizon Internet Services Inc. ("Verizon") respectfully submits this conditional cross-petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. If this Court grants the Recording Industry Association of America, Inc.'s ("RIAA's") petition for certiorari to address the issue of statutory construction presented therein, Verizon respectfully submits that the Court should also grant this conditional cross-petition, which raises substantial questions under Article III and separation of powers principles that go directly to the enforceability of the novel subpoena provision of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(h), as interpreted and applied by RIAA and the district court. These issues were properly raised in both courts below and ruled upon by the district court. Pet. 2a & n.1, 59a-75a.[1]

As the district court's lengthy second opinion in these consolidated cases exemplifies, Pet. 55a-111a, any ruling that the subpoena provision contained in 17 U.S.C. § 512(h) applies to Internet service providers engaged in pure transmission or "conduit functions" would necessitate a further examination of whether this "novel provision," Pet. 22a, violates Article III and separation of powers principles by purporting to compel a federal court to issue and enforce a writ of subpoena in the absence of any underlying case or controversy. To Verizon's knowledge, the Article III issue has been raised in every pending case where RIAA has attempted to apply the DMCA subpoena provision to peer-to-peer communications.[2] Thus, the very uniformity and

1. Throughout this cross-petition, Verizon refers to the petition for certiorari filed by RIAA and docketed as No. 03-1579 as "Pet." and to this cross-petition as "Cross-Pet." Verizon refers to its opposition to RIAA's petition, which Verizon is filing concurrently with this conditional cross-petition, as "Opp."

2. *RIAA v. Charter Communications, Inc.*, No. 03-3802 (8th Cir.) (pending); *In re Subpoena to Univ. of N.C.*, No. 1:03mc138 (M.D.N.C.) (pending); *In re Subpoena to N.C. State Univ.*, No. 1:03mc139 (M.D.N.C.) (pending); *Pac. Bell Internet Servs. v. RIAA*, No. 03-CV-3560-JL (N.D. Cal.) (dismissed in part and transferred in part to D.D.C.).

nationwide certainty for which RIAA pleads in its own petition, Pet. 27-29, strongly counsels in favor of granting Verizon's conditional cross-petition if the Court decides to devote its limited resources to these subpoena enforcement proceedings.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 351 F.3d 1229 (D.C. Cir. 2003) and is reprinted in RIAA's petition for certiorari. Pet. 1a-17a. That court's order denying RIAA's petition for rehearing is reprinted at Pet. 112a, and its order denying RIAA's petition for rehearing en banc is reprinted at Pet. 113a. The opinions of the United States District Court for the District of Columbia are reported at 240 F. Supp. 2d 24 (D.D.C. 2003) and 257 F. Supp. 2d 244 (D.D.C. 2003), and are reprinted at Pet. 18a-54a and 55a-111a, respectively.

JURISDICTION

Cross-petitioner respectfully submits that the United States District Court for the District of Columbia lacked jurisdiction to issue or enforce the underlying subpoenas in these miscellaneous proceedings because there was no live case or controversy within the meaning of Article III at the time of either their issuance or enforcement. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 172-74 (1989). Cross-petitioner also respectfully submits that the assignment of purely investigative, non-judicial duties to both inferior officers of the Judicial Branch and Article III judges violates established separation of powers principles. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 382 (1989) ("[T]he Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976))).

Cross-petitioner does not, however, contest the jurisdiction of the court of appeals or this Court to examine the constitutional questions whether these subpoenas were issued and enforced in violation of the "case or controversy" requirement of Article III or principles of separation of powers that this Court has found inherent in the tripartite structure of the national sovereign. Pet. 2a n.1, 60a n.6; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). At the very least, this Court has jurisdiction to determine whether the district court had jurisdiction to conduct any subpoena enforcement proceedings, as this Court always has jurisdiction to examine its own jurisdiction and the jurisdiction of the courts below. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

The D.C. Circuit issued its decision on December 19, 2003. It summarily denied RIAA's timely petition for rehearing or rehearing en banc on February 24, 2004 without any member of the D.C. Circuit calling for a response. Pet. 112a, 113a. Cross-petitioner Verizon files this petition under Rule 12.5 as a cross-petition conditioned on this Court's granting the petition filed by RIAA (No. 03-1579), docketed on May 26, 2004. This Court has jurisdiction over both RIAA's petition for certiorari and Verizon's conditional cross-petition pursuant to 28 U.S.C. § 1254(1).[3]

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3. Verizon has filed an opposition to RIAA's petition and strongly believes, for the reasons given therein, that this Court's review is wholly unwarranted. Verizon presents this conditional cross-petition out of an abundance of caution to ensure that, *if* the Court should find sufficient reason to grant RIAA's primary petition, the Court will have all of the statutory and constitutional issues presented by these consolidated cases properly before it. *See* Robert L. Stern, *et al.*, Supreme Court Practice 443-49 (8th ed. 2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves Article III of the U.S. Constitution, reprinted herein at Cross-Pet. 1a-2a, and the subpoena provision of the DMCA, 17 U.S.C. § 512(h), reprinted in Verizon's Opp. at 45a-47a.

STATEMENT OF THE CASE

As the district court itself acknowledged, the subpoena procedure contained in the DMCA is an "innovation." Pet. 60a. It purports to authorize a private party to employ the coercive power of the federal courts to discover the identities of individuals engaging in anonymous communications over the Internet without placing any issue of federal law before the court or seeking any recognized form of judicial relief through the court's adjudication of an actual case or controversy between adverse parties. Rather, the subpoena provision attempts to use the court and its coercive power as an investigative tool to further the business interests of a private party. This is an unwarranted and fundamental departure from constitutional principles and historical practice. If the district court's application of the subpoena provision is allowed to stand, it will intrude upon judicial control of inferior judicial officers and sanction the assignment of myriad non-adjudicative tasks to both Article III judges and their clerks.

A. The Importance of Anonymous Speech and Association to the Growth of the Internet.

The value of the Internet as a forum for the free exchange of ideas and information cannot be overstated. Congress has expressly found that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). In fact, this Court found as early as 1997 that "it is no exaggeration to conclude that the content on the Internet is as

diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 852 (1997). It is for this reason that Congress consistently has sought "to promote the continued development of the Internet and other interactive computer services" "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(1)-(2), and to "ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand," S. Rep. No. 105-190, at 8 (1998) (DMCA conference report).

Not only does the Internet enable millions of users worldwide to communicate with one another, almost instantaneously, concerning every political, cultural, and religious topic imaginable, but it enables Internet users to speak and associate anonymously in a borderless forum. It is this "ability of individual users to log onto the Internet anonymously, undeterred by traditional social and legal restraints, [that] tends to promote the kind of unrestrained, robust communication that many people view as the Internet's most important contribution to society." *Patentwizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001).

It is a legal fact of life that virtually any new medium for the organization and dissemination of information in a wide variety of formats not only will be used as a forum for legitimate and fully protected expressive activity, but will also be misused by some to purloin the expression of others in violation of our copyright laws. The Internet in general, and new peer-to-peer file sharing applications in particular, are no exception to this general proposition.

There is no question that, while peer-to-peer file sharing applications have a host of perfectly licit uses, *see generally MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035-36 (C.D. Cal. 2003) (noting substantial non-infringing uses for peer-to-peer software), *appeal pending*, No. 03-55894 (9th Cir.), a number of peer-to-peer users engage in the unauthorized exchange or offering for download of copyrighted sound

recordings. The same anonymity that has promoted the unfettered exchange of ideas since the Founding of the Republic, *Talley v. California*, 362 U.S. 60, 65 (1960), and has served as a protective umbrella for unpopular causes and associations, *NAACP v. Alabama*, 357 U.S. 449, 461 (1958), can be abused to make the detection and punishment of civil wrongdoing more difficult.

When an individual uses the Internet to communicate with others by email, browse pages on the World Wide Web, or participate in a virtual "chat room" with other Internet users, an Internet Protocol ("IP") address is used to route the communication to and from the user. As a user sends or receives email or visits various websites, his or her IP address becomes available to others. The disclosure of an IP address is not in and of itself a threat to the privacy, expressive, or associational rights of the Internet user because, unlike telephone numbers, *there is no publicly available directory that associates IP addresses with particular Internet users*. In fact, most reputable websites adhere to privacy and security policies that preclude the use of IP addresses to identify particular individuals or associate them with specific content that they have sent or received over the Internet.[4]

Only an individual's Internet service provider has access to the records that can match a particular IP address with a particular computer and a particular subscriber. Thus, only a service provider can supply the necessary information to

4. For example, this Court's own website contains a "Proprietary and Security Notice," which provides in pertinent part that:

> The Supreme Court will collect no personal information about visitors to this Website. The only information provided to the Court by GPO is the visitor's domain and Internet Protocol address, the type of browser and operating system used to access the site, the files visited and the time spent in each file, and the time and date of the visit.

See http://www.supremecourtus.gov/security.html (visited June 21, 2004).

someone who seeks to associate a subscriber with content sent, received, or viewed over the Internet. There are, however, publicly available databases that enable any member of the public to match a particular IP address to a particular Internet service provider. Thus, a copyright owner or its representative can identify the service provider that "owns" an IP address, and that service provider itself can match the IP address to an individual subscriber's account.

The problem for copyright owners—or anyone else interested in uncovering personal information about individual Internet users—is how to obtain this otherwise confidential information from the service provider. The same legal dilemma is faced by anyone, whether his or her motives are good or bad, who seeks information to identify an otherwise anonymous Internet user.

B. The Traditional "John Doe" Lawsuit

The problem of how to identify an anonymous or pseudonymous person in order to seek legal redress against him or her did not arise with the recent advent of peer-to-peer software or even with the emergence of the Internet itself. Rather, it is as old as the common law itself, as is the tried and true judicial solution—the "John Doe" lawsuit. In a traditional John Doe lawsuit, the plaintiff files a lawsuit, complete with the factual and legal allegations necessary to state a claim against the unknown or anonymous defendant, and thus invokes the court's authority to resolve a live case or controversy. In that context, the plaintiff then petitions the court for permission to conduct court-supervised discovery to ascertain the identity of the defendant, not to obtain information for extra-judicial purposes but to permit the plaintiff to prosecute the lawsuit that has been presented to the court.

The John Doe lawsuit has a long history at English common law dating back to 1630 and has survived the test of time in

American courts from the Founding of the Republic to today.[5] Indeed, this legal tool has been relied on by every conceivable type of plaintiff in a wide variety of causes of action, including suits by Internet service providers against spammers who subscribe to other providers' services, suits by private individuals against alleged defamers, and suits by copyright owners against alleged infringers.[6] In fact, since the D.C. Circuit's opinion in

5. One of the earliest mentions of "J. Doo" dates to 1630, in the third edition of *The Attorney's Academy* by Thomas Powell. *See* Frank W. Grinnel, *John Doe and Richard Roe – Their Portraits, Their History, Their Services in the Advancement of Justice Through the Rulemaking Power of the Courts*, Mass. L.Q., Aug. 1935, at 26, 27. At and even before the time of the Framing, "John Doe" was most often used as the fictitious lessee in an action for ejectment. *See, e.g., Doe v. Myjil*, 2 Va. Colonial Dec. B161, 1735 WL 1 (Va. Gen. Ct. Oct. 1735). "John Doe" also has a long pedigree as a mechanism for the identification of otherwise unknown defendants. *See, e.g., Irving v. Carpentier*, 11 P. 391, 392 (Cal. 1886); *Stearns v. Doe*, 78 Mass. 482 (1859). Today, the John Doe lawsuit is available to identify otherwise unknown defendants in almost every state court system in the Union and the federal courts. *See, e.g.*, Ala. R. Civ. P. 9(h); Ariz. R. Civ. P. 10(f); Haw. R. Civ. P . 17(d); Idaho R. Civ. P. 10(a)(4); Ind. R. Trial P. 17(F); Minn. R. Civ. P. 9.08; Miss. R. Civ. P. 9(h); Nev. R. Civ. P. 10(a); N.D.R. Civ. P. 9(h); Ohio R. Civ. P. 15(D); Or. R. Civ. P. 20(H); P.R.R. Civ. P. 15.4; S.C.R. Civ. P. 10(a)(1); S.D.R. Civ. P. 15-6-9(h); Utah R. Civ. P. 9(a)(2); Wash. Super. Ct. R. Civ. P . 10(a)(2); Wyo. R. Civ. P. 17(d).

6. *See, e.g., AOL v. John Does 1-30*, No. 03-472-A (E.D. Va. filed Apr. 14, 2003) (using John Doe procedure to identify senders of unsolicited bulk email); *Microsoft Corp. v. Does 1-50*, No. C04-0516C (W.D. Wash. Apr. 20, 2004) (same); *La Societe Metro Cash & Carry France v. Time Warner Cable*, No. CV030197400S, 2003 Conn. Super. LEXIS 3302 (Dec. 2) (using John Doe procedure to identify Internet user who sent allegedly defamatory email under a fictitious name); *Immunomedics, Inc. v. Doe*, 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001) (using John Doe procedure to identify anonymous Internet users who posted messages that allegedly contained Plaintiff's confidential and proprietary information); *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26 (2000), *rev'd on other grounds*,

(Cont'd)

this case issued in December 2003, the recording industry itself has filed "John Doe" lawsuits against more than 3,000 alleged infringers, in well over a dozen district courts across the country.[7]

C. The DMCA's Novel Subpoena Provision

The DMCA subpoena provision could not be more foreign to our common law traditions and the established boundaries of the "case or controversy" requirement of Article III. In fact, in RIAA's view, the more "streamlined" and "ministerial" the procedure for obtaining access to the compulsory power of the Article III courts, the better. Pet. 28 (decrying "cumbersome procedure" of John Doe suits, in which a complaint must be filed and "[c]opyright owners must obtain court permission before seeking prompt discovery").

Section 512(h) purports to do away with judicial supervision and the normal adversarial process in favor of a formulaic *ex parte* statement filed with the clerk of the court. *Id.* § 512(h)(2)(A) (citing *id.* § 512(c)(3)(A)). That statement need recite only a subjective "good faith belief" that an unspecified exclusive right under the copyright laws has been violated. *Id.* § 512(c)(3)(A)(v). The statement can be filed by anyone claiming to act on a copyright holder's behalf,

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(Cont'd)

America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001) (using John Doe procedure to seek identity of five anonymous Internet users who published defamatory statements and revealed confidential information in an Internet chat room).

7. *See, e.g., UMG Recordings, et al. v. John Does 1-199*, No. 04-093 (D.D.C. Mar. 10, 2004) (record industry plaintiffs' motion for expedited discovery granted); *Capitol Records, Inc., et al. v. Does 1-250*, No. 1:04cv472 (S.D.N.Y. Feb. 26, 2004) (same); *Virgin Records, et al. v. Does*, No. 1:04cv438 (N.D. Ga. Mar. 3, 2004) (same); *Maverick Record Co., et al v. Does 1-12*, No. 1:04cv546 (D. Colo. Apr. 8, 2004) (same); *Lava Records, LLC, et al. v. Does 1-55*, No. 1:04cv484 (E.D. Va. May 7, 2004) (same).

id. § 512(h)(1), and there is no mechanism for even the most rudimentary verification of the bona fides of the requester.[8] The statements in the application need not state any cause of action, and need not be supported with the kind of due diligence and factual investigation required to file a complaint under Federal Rule of Civil Procedure 11. *See Rossi v. Motion Picture Ass'n of Am.*, No. Civ. 02-00239, 2003 U.S. Dist. LEXIS 12864, at *8-*9 (D. Haw. Apr. 29) (no factual investigation required to support "good faith belief" of infringement under subsection (c)(3)(A)(iii)).[9]

Finally, the subpoena requester does not place *any* issue of federal law before the district court for resolution. Indeed, the requester is not even required to aver any intention to bring an infringement action against the Internet user. Section 512(h) thus takes a judicial investigative tool that is proper when used in the context of an actual case or controversy (the third-party subpoena) and disconnects it from its only constitutionally sanctioned use—the development of facts to aid in the resolution of a live controversy of federal law between adverse parties.

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8. By contrast, an action for infringement of copyright can be brought only be the owner of the exclusive rights. 17 U.S.C. § 501(b); *see, e.g., Gardner v. Nike, Inc.*, 279 F.3d 774, 781 (9th Cir. 2002) (affirming the district court's dismissal of infringement action because plaintiff licensee did not possess exclusive rights and therefore lacked standing).

9. An actual suit for infringement requires specification of the exclusive rights of the copyright owner that allegedly have been violated, *see* 17 U.S.C. § 106, as well as proof of registration of the copyright with the U.S. Copyright Office, 17 U.S.C. § 411; 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 12.09[A] (2004) ("[A]n allegation of compliance with the statutory registration and deposit requirements is jurisdictionally required, so that a motion to dismiss will be granted absent such an allegation." (footnotes omitted)). Section 512(h) incorporates neither requirement.

D. The Subpoenas at Issue in These Consolidated Enforcement Proceedings

RIAA obtained from the clerk of the district court, and served upon Verizon, two separate subpoenas purporting to invoke the authority of Section 512(h). These subpoenas directed Verizon, under pain of contempt, to disclose to RIAA the names, addresses, and telephone numbers of two otherwise anonymous users of Verizon's Internet access service. These subpoenas were issued in the name of the U.S. District Court, signed by the clerk of that court, and carried with them the threat of judicial enforcement in the face of inaction or resistance. *See, e.g.*, Fed. R. Civ. P. 45(e).

At the time RIAA requested, and the district court issued, the subpoenas at issue, RIAA had not filed a complaint seeking adjudication of any federal cause of action against anyone. Nor had it requested any recognized form of judicial relief. Nor did RIAA aver that it had any intention of filing such a lawsuit, as evidenced by its insistence throughout this litigation that it need not file, or state an intention to file, a federal lawsuit in order to obtain a DMCA subpoena. Pet. 18-19, 27-29.

E. The Proceedings Below

1. The District Court's Decisions

Verizon refused to comply with the subpoenas and did not reveal its subscribers' personal identifying information to RIAA. In the first proceeding in the district court, RIAA filed a motion to enforce the subpoena, and Verizon objected on the ground that Section 512(h) did not apply where a service provider performs a mere transmission or "conduit" function. Verizon also argued that the truncated procedure for issuance and enforcement of the subpoena raised serious constitutional questions under both Article III and the First Amendment. Pet. 49a-54a.

The district court adopted RIAA's statutory position in the first proceeding. Pet. 26a-44a. As relevant here, the district court also dismissed the Article III contention in a footnote. *Id.* at 53a n.21. The district court accurately described the Article III problem—that "the subsection (h) subpoena power" violates "Article III of the Constitution [because] there must be a 'case or controversy' before the Court to provide jurisdiction to issue a subpoena," *id.* It nonetheless responded to this argument with a non sequitur by stating that the reference to the Federal Rules of Civil Procedure in subsection (h)(6) provides "protection" to service providers. The district court did not explain how this "protection," to the extent it applies to DMCA subpoenas, satisfies the "case or controversy" requirement of Article III.

In the second proceeding consolidated on appeal, Verizon filed a motion to quash the second DMCA subpoena primarily on the grounds that the subpoena provision violates the First Amendment, Article III's case or controversy requirement, and general principles of separation of powers. The district court denied Verizon's motion. Although the court recognized that a DMCA subpoena was not supported by any case or controversy at the time of its issuance, it reasoned that because the act was, in its view, "ministerial" it did not involve an exercise of Article III power at all. *Id.* at 61a-62a, 74a n.12. Alternatively, the district court ruled that if the issuance and enforcement of the subpoenas was a judicial act, its constitutionality was supported by analogy to various statutes involving enforcement of administrative process and Federal Rule of Civil Procedure 27. *Id.* at 64a-73a.

While the district court upheld the application of the DMCA subpoena provision outside of a pending case or controversy on these two alternative grounds, it rejected a third ground advanced by both RIAA and the United States (before both the district court and later the D.C. Circuit)—that "a case or controversy sufficient to provide a jurisdictional basis for the issuance of a subpoena inheres in the dispute between the copyright holder and the service provider over disclosing the

alleged infringer's name." *Id.* at 74a n.12. The court stated that, because "at the time of issuance, a § 512(h) subpoena will not necessarily be tethered to a present or even anticipated adversary proceeding, involving a real, not a hypothetical, controversy' over providing the name," Section 512(h) is "not, as RIAA and the United States contend, analogous to 29 U.S.C. § 1132(c)(1), which allows an ERISA beneficiary to bring a civil action against a plan administrator for information only after the administrator has failed or refused to comply with a request for the information." Pet. 74a n.12.

2. The Court of Appeals' Reversal of the District Court on Statutory Grounds

The D.C. Circuit reversed the district court's decisions and ordered the lower court to vacate its order granting RIAA's motion to enforce in the first proceeding and to grant Verizon's motion to quash in the second one. *Id.* at 17a. As recounted in Verizon's opposition, Opp. 11-13, the court of appeals found after thorough examination of the text, structure, history, and purpose of Section 512 in general, and the subpoena provision in particular, that "§ 512(h) does not authorize the issuance of a subpoena to an [Internet service provider] acting solely as a conduit for communications the content of which is determined by others." Pet. 2a. Because the appellate court decided both of the consolidated appeals in Verizon's favor on statutory grounds, the court did "not reach either of Verizon's constitutional arguments." Pet. 2a & n.1.

In a footnote, the D.C. Circuit explained that "[t]he district court's jurisdiction to issue the *orders* here under review is not drawn into question by Verizon's Article III argument." *Id.* (emphasis added) (citing *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 476-78 (1894) ("application of ICC to enforce subpoena issued by agency in furtherance of investigation presents 'case or controversy' subject to judicial resolution")). That is, the D.C. Circuit apparently believed that,

notwithstanding Verizon's jurisdictional argument calling into question the district court's authority to *issue* the subpoenas, the controversy over whether it could in fact *enforce* such subpoenas itself conferred Article III jurisdiction on the district court. Thus, under the D.C. Circuit's reasoning, the district court (or the court of appeals on review) could resolve the question whether the subpoenas should be enforced on any ground—refusing to enforce the subpoenas either because the district court lacked statutory authority to issue them or because it lacked authority under Article III to enforce them.

This observation regarding Article III was the D.C. Circuit's response to full briefing of the issue by all parties on appeal and amplification of the issue at oral argument. *See, e.g.*, Hearing Transcript, attached hereto at Cross-Pet. 6a-9a (Judge Williams making the distinction between jurisdiction to issue and jurisdiction to enforce the subpoenas); *id.* at 36a (same); *id.* at 34a-35a (Judge Ginsburg inquiring why the United States "address[ed] only one of the . . . Article III objections that's been raised" and did not "respond to the objection raised, the separation of powers objection"); *id.* at 37a-38a. The D.C. Circuit concluded that it could reverse the district court's orders on statutory grounds and confirmed that the district court's inability to issue or enforce the subpoenas under Article III was an alternative ground that could support a judgment for Verizon and that was properly raised and presented below.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. If This Court Grants RIAA's Petition, It Should Also Consider The Alternative Article III Ground For Affirmance Of The D.C. Circuit's Judgment Below.

A. Issuance of the DMCA's Novel Subpoena Device Outside of a Pending Case or Controversy Violates Article III and Conflicts with this Court's Precedent.

Article III, section 2 of the Constitution expressly limits the exercise of federal judicial power to specifically enumerated "Cases" and "Controversies." Cross-Pet. 1a. A "case" in the constitutional sense has consistently been defined as "a suit instituted according to the regular course of judicial procedure." *Muskrat v. United States*, 219 U.S. 346, 356 (1911). From the earliest days of the Republic, this requirement has been understood to entail, at a minimum, an adversarial proceeding that involves at least two parties, a cause of action within the jurisdiction of the federal courts, and a prayer for judicial relief that is determinative of some set of rights or obligations as between those parties. *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171-72 (1803); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Yale Todd's Case*, *printed at* 54 U.S. (13 How.) 52 (1851); *Gordon v. United States*, 117 U.S. Appx. 697, 699-706 (1864); *Muskrat*, 219 U.S. at 353-63; *United States v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950); *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 174 (1989).

The issuance and enforcement of subpoenas are no exception to Article III's requirement that judicial acts must occur within the context of a case or controversy properly pending before a federal court. A subpoena is a form of *judicial process*—a tool to assist the court and the parties in the resolution

of an actual case or controversy. Thus, this Court repeatedly has made clear that "[t]he *judicial* subpoena power not only is subject to specific constitutional limitations . . . but also is subject to those *limitations inherent in the body that issues them* because of the provisions of the Judiciary Article of the Constitution." *Morton Salt*, 338 U.S. at 642 (emphases added). The Court reaffirmed this principle in *Catholic Conference*, holding that "if a district court does not have subject-matter jurisdiction over the underlying action, and the *process was not issued* in aid of determining that jurisdiction, then the process is void and an order of civil contempt based on refusal to honor it must be reversed." 487 U.S. at 76 (quoting *Morton Salt*, 338 U.S. at 642) (emphasis added); *see also Houston Bus. Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996) (holding that a district court is "*without power to issue a subpoena* when the underlying action is not even asserted to be within federal-court jurisdiction" (emphasis added)); *accord Barwood, Inc. v. Dist. of Columbia*, 202 F.3d 290, 294-95 (D.C. Cir. 2000).

This Court reiterated these limits on the judicial power in *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989). The case involved a form of class action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, whereby a plaintiff is authorized to sue for damages and injunctive relief for age discrimination "on behalf of himself and other employees similarly situated," provided that individual employees consent to the representational suit. 493 U.S. at 167-68 (citing 29 U.S.C. § 216(b)). The Court held that the district courts "have discretion, in appropriate cases," to facilitate notice to potential plaintiffs in such a representational action. *Id.* at 169-70. Tellingly, the Court relied upon the existence of a pending Article III case or controversy in so holding: "*once an ADEA action is filed*, the court has a managerial responsibility to oversee the joinder of additional parties to assure that the

task is accomplished in an efficient and proper way." *Id.* at 170-71 (emphasis added).[10]

Notably, the dissenting opinion of Justice Scalia, joined by the Chief Justice, *id.* at 174, maintained that *even in the context of a pending lawsuit*, the district court did not possess authority to involve itself in the discovery of, or notice to, potential additional plaintiffs. This "unheard-of role of midwifing" lawsuits yet to be filed, *id.* at 176-77, while quite properly assignable to an executive agency, could not be conferred upon an Article III court. In Justice Scalia's view, the notice and the discovery order entered by the district court were "void because of lack of authority to act for a purpose unrelated to adjudication of the case before it." *Id.* at 179.

As interpreted and applied by the district court, Section 512(h) surpasses the jurisdictional limits on Article III courts that have been established and adhered to from *Hayburn's Case* to *Hoffmann-La Roche*. Section 512(h) is the equivalent of the judicial "solicitation of claims" condemned by the majority in *Hoffmann-La Roche* as destructive of "judicial neutrality" by making the court an instrument of *ex parte* investigative applications. *Id.* at 174. The logic of both the majority and the dissent in *Hoffmann-La Roche* compels the conclusion that subpoenas issued outside of pending lawsuits are beyond judicial competence and undermine judicial independence.

That the district court improperly ignored these fundamental principles is clear on the face of its opinion in the second subpoena proceeding. The lower court recognized that "'[f]ederal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends.'" Pet. 60a.

10. Justice Kennedy's majority opinion carefully distinguished between actions taken in aid of existing jurisdiction and a judicial search for potential lawsuits. "Court intervention in the notice process for case management purposes is distinguishable *in form and function* from the solicitation of claims." 493 U.S. at 174 (emphasis added).

It further recognized that, "at the time of issuance, a § 512(h) subpoena will not necessarily be tethered to a present or even anticipated 'adversary proceeding, involving a real, not a hypothetical, controversy' over providing the name." *Id.* at 74a n.12 (citation omitted); *id.* at 100a ("To be sure, the clerk of the court is not commonly called upon to issue a subpoena in the absence of a pending case or controversy."). Thus, the lower court *conceded that no Article III case or controversy was present when the underlying DMCA subpoenas were issued*, but it nonetheless refused to apply the teachings of this Court in *Morton Salt* and *Catholic Conference*.

The district court, RIAA, and the United States have offered five separate (and conflicting) rationales for refusing to apply the holdings of the cases cited above to the novel subpoena power at issue here. Indeed, RIAA itself in its briefs before the D.C. Circuit refused to endorse the district court's primary rationale for rejecting Verizon's Article III challenge—namely, that the clerk's issuance of a DMCA subpoena is a permissible "ministerial" duty; the United States simply accepted without question that the clerk's issuance of a DMCA subpoena *is* a judicial act and asserted that the mere *possibility* that the copyright owner could bring an infringement action in the future was sufficient to confer jurisdiction on the court; and both RIAA and the United States asserted that there exists a current case or controversy between the copyright representative and the service provider at the time the subpoena is issued, a position forcefully rejected in a footnote by the district court. Pet. 74a n.12. It is not surprising, then, that none of these rationales is independently satisfying or persuasive, and some actually raise more separation of powers questions than they resolve.

1. In order to reach the conclusion that Section 512(h) is constitutional, the district court endorsed the extraordinary position that "the clerk's issuance of a § 512(h) subpoena does not involve either the exercise of judicial power or the exercise by federal judges of Article I or Article II-type investigatory

power." Pet. 61a. Based upon its belief that the issuance of a Section 512(h) subpoena is "a quintessentially ministerial duty," *id.*, the district court apparently concluded that it does not involve the exercise of the constitutional power of *any* branch of government.

This transparent attempt to side-step well-established limitations on the judicial power flies in the face of this Court's precedent. The two subpoenas here were issued *in the name of the district court* and carried with them *on the day of their issuance* the enforcement authority that federal courts derive only from Article III of the Constitution.[11] No doubt the subpoenas at issue in *Catholic Conference* and *Houston Business Journal* were processed by clerks of the federal courts—but their *issuance* outside a case or controversy rendered them void and unenforceable by an Article III court. Under the district court's flawed reasoning, as long as a clerk initiates the process—regardless of whether the clerk is employed by the district court, a court of appeals, or *this* Court—Article III courts can be pulled into a myriad of purely investigative duties that are clearly forbidden to them by the Constitution.

2. In some tension with its primary holding, the district court also apparently endorsed the argument that the clerk of the court exercises legislative authority delegated pursuant to Article I of the Constitution in issuing DMCA subpoenas. Pet. 63a. In the court's view, the fact that Section 512(h) was statutorily authorized served to distinguish *Catholic Conference* because, in that case, "the only conceivable source for the district court's jurisdiction to issue a subpoena was a pending case or controversy." Pet. 70a. In essence, the district court held that Congress had by statute supplanted the need for a case or controversy.

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11. *See, e.g.*, Advisory Committee Notes to Fed. R. Civ. P. 45 (1937) ("This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts."); *In re Simon*, 297 F. 942, 944 (2d Cir. 1924) ("The fact that a writ of subpoena is actually signed in writing by the clerk of the court . . . makes it none the less the court's order.").

This argument simply underscores the constitutional violation. This Court has repeatedly made clear that the case or controversy requirement is a *per se* rule; it cannot be relaxed or modified by Congress. Thus, in *Hayburn's Case*, five of the six Justices of this Court, sitting as Circuit Judges, concluded that a law that assigned to federal judges the role of taking pension applications and making recommendations to the Secretary of War improperly imposed duties "not of a judicial nature." 2 U.S. at 410-14. Chief Justice Marshall alluded to the results in those circuit cases with favor in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and further noted that Congress had quickly repealed the 1792 law that assigned *ex parte* investigative duties to Article III judges. *Id.* at 171-72.

Similarly, in *Ferreira*, this Court struck down a law that assigned to district court judges in Florida the adjustment of claims by Spanish inhabitants under a treaty. 54 U.S. 40. The Court found that the role prescribed by statute was not judicial in nature:

> For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there . . . .

Id. at 46-47; *accord Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 485 (1894) (Harlan, J.) (reaffirming the "salutary doctrine that Congress . . . may not impose upon the courts of the United States any duties not strictly judicial").

These principles were expressly reaffirmed by this Court in *Morton Salt* and *Catholic Conference*—in the very context of the power of the federal courts to issue writs of subpoena. In *Morton Salt* the Court found: "The *judicial subpoena power* not only is subject to specific constitutional limitations, which also apply to administrative orders, . . . but *also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.*" 338 U.S. at 641-42 (emphases added). In *Catholic Conference*, the Court cited favorably to *Morton Salt* in support of its holding that a subpoena issued in the absence of subject matter jurisdiction is void. 487 U.S. at 76 (quoting *Morton Salt*, 338 U.S. at 642). Both *Morton Salt* and *Catholic Conference* make clear that the limitations of Article III are analogous to those contained in the Bill of Rights, that they apply to the issuance of subpoenas, and that they cannot be relaxed or modified by statute.

The lower court's "statutory authority" holding is also directly contrary to this Court's Article III precedent on standing. Although the lower court recognized that there was no live controversy at the time these subpoenas were issued, it found that the statute solved this constitutional dilemma. But Congress is not free to alter the requirement that binding judicial action can occur only in the context of live, adversarial proceedings regarding a claim within the subject matter jurisdiction of a federal court. The requirement of Article III standing is "absolute" and not "malleable by Congress." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996); *accord Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573, 577 (1992); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Beyond the *per se* violation of the requirements of Article III, legislative co-opting of federal judicial clerks for non-judicial duties raises a host of *additional* separation of powers concerns. The clerk of court is an inferior officer of the Judicial Branch, who derives all of his or her authority from

appointment by an Article III judge. 28 U.S.C. § 956; *see also Buckley v. Valeo*, 424 U.S. 1, 126 (1976). By definition, the derivative authority of an inferior officer generally cannot exceed the authority of the appointing officer. *See, e.g., Lloyd v. Lawrence*, 60 F.R.D. 116, 118 (S.D. Tex. 1973) ("Obviously, the Clerk may not take action which the Court itself may not take."). Thus, it is difficult to see how the clerk can be authorized to take action that an Article III judge could not take, particularly where the action is taken in the name of the court and requires the exercise of the court's enforcement authority to have any effect.

The assignment of extra-judicial duties to an inferior judicial officer is, in itself, an intrusion into the powers and organization of the Judicial Branch and would necessarily lead to bizarre consequences. The court could be forced to review clerk's actions for an abuse of discretion or clear error when those actions are authorized by Article I as opposed to Article III. The clerk's office would have to decide whether to give priority to the investigative work assigned to it by Congress over the adjudicative work assigned to it by Article III judges. Under the district court's reasoning, Congress could use any of its Article I, section 8 powers to assign myriad investigative and non-judicial tasks to the clerk of any federal court (including this one) and then use Article III judges to enforce those investigative demands. *Cheney v. United States Dist. Ct. for the Dist. of Columbia*, slip op. at 12, No. 03-475 (U.S. June 24, 2004) ("We have recognized that [e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." (citations and internal quotation marks omitted)).

The district court itself recognized the concern that DMCA subpoenas would divert the resources of inferior judicial officers from the work of the courts, but found that to date "no such barrage of requests has occurred." Pet. 73a. Yet in the period between when the district court penned those

words and when the D.C. Circuit reversed the district court on statutory grounds, the district court was flooded with more than 4,000 DMCA subpoena requests, such that a spokesperson for the Administrative Office of the U.S. Courts described the clerk's office as "functioning more like a clearing house, issuing subpoenas for all over the country." *RIAA nearing 1,000 subpoenas against file-sharing suspects*, Pioneer Press (July 18, 2003), *at* http://www.twincities.com/mld/pioneerpress/business/technology/6335275.htm?1c (visited June 23, 2004). In fact, the DMCA subpoenas were "so prolific that the" district court, "already suffering staff shortages, [was] forced to reassign employees from elsewhere in the clerk's office to help process paperwork." *Id.*

3. The district court also attempted to justify its conclusion that Section 512(h) conformed with Article III's case or controversy requirement by opining that in a "real-world sense," an Article III judge does not take action until a dispute arises over enforcement of the subpoena, "at which time there is a concrete controversy sufficient to confer jurisdiction under Article III of the Constitution." Pet. 63a. The suggestion, however, that subsequent litigation can supply the necessary "case or controversy" for purposes of Article III, *id.*, puts the subpoena cart before the jurisdictional horse. The jurisdiction necessary to issue the subpoena cannot be created by an after-the-fact dispute. "A federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction." *In re Marc Rich & Co.*, 707 F.2d 663, 669 (2d Cir. 1983). Both *Catholic Conference* and *Houston Business Journal* make this clear: the subsequent dispute over the legality of the subpoenas could not create the requisite federal case or controversy to support their issuance. *See also Barwood*, 202 F.3d at 294-95 (rejecting argument that violation of a temporary restraining order could supply federal jurisdiction as "a remarkable feat of bootstrapping");

McCook Metals LLC v. Alcoa, 249 F.3d 330, 334 (4th Cir. 2001) (noting that Fed. R. Civ. P. 37 & 45 "do not confer subject matter jurisdiction upon the [federal] courts"); Fed. R. Civ. P. 82.

4. The lower court also opined that, "assuming that the issuance of a § 512(h) subpoena can be conceptualized as a judicial act," Pet. 64a, it was nonetheless constitutional by analogy to other statutes. The lower court proceeded to cite four federal statutes *seriatim*, without analysis, for the proposition that "§ 512(h) is by no means as unique as Verizon claims." *Id.* Nowhere, however, was the lower court willing to say that any of these statutes authorized the issuance and enforcement of purely investigative judicial process, because they do not. The statutes relied upon by the lower court are clearly distinguishable as they: (1) involve the issuance of subpoenas that are not enforceable by Article III courts, 2 U.S.C. § 338; (2) involve an underlying case or controversy regarding independent issues of federal law pending before a federal agency, 35 U.S.C. § 24 ("testimony . . . to be taken for use in any contested case in the Patent and Trademark Office"); 7 U.S.C. § 2354(a) (same for Plant Variety Protection Office); *see Sheehan v. Doyle*, 513 F.2d 895, 897-98 (1st Cir. 1975); or (3) permit a clerk to issue a subpoena during a contested arbitration involving federal labor matters where the award itself is subject to judicial enforcement, 45 U.S.C. § 157(h). None of these statutes places the clerk and the court in the role of the initial investigator of facts that may or may not be useful in the potential civil claims of private parties.

5. Finally, the lower court reached for Federal Rule of Civil Procedure 27 as a "compelling precedent for judicial compulsion of information outside the context of a pending case or controversy." Pet. 70a. The district court recognized that there were differences between Rule 27 and Section 512(h), *id.* at 68a-69a, but sought to characterize those

differences as "neither as substantial nor consequential as Verizon contends," *id.* at 68a. The lower court ignored, however, that there are at least four fundamental differences, of constitutional dimension, that separate Rule 27 proceedings from the subpoena at issue here.

First, a Rule 27 petition must state under oath an unequivocal intention to bring a lawsuit in federal court. Fed. R. Civ. P. 27(a)(1); *In re Skylight Shipping Corp.*, No. 99-1290, 1999 WL 1293472, at *2 (E.D. La. July 9) ("[T]he rule is clear by its terms that the petitioner must demonstrate that it expects to be a party to such an action and that it is presently unable to bring it or cause it to be brought. 'The allegation that the petitioner expects to be a party to an action must be *unequivocal*. . . .'" (citation omitted)); 8 Charles A. Wright, *et al.*, Federal Practice and Procedure § 2072 (3d ed. 1998) (same). The lower court recognized that this was not the case in the context of a Section 512(h) subpoena. Pet. 68a-69a ("an entity seeking a subpoena under § 512(h) need not state that it expects to be a party to an action cognizable in federal court"). And, RIAA repeatedly stated below that it was interested only in *contacting* the subscribers at issue, not necessarily in *suing* them.[12]

Second, Rule 27 is not a discovery tool, *see Penn. Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1376 (D.C. Cir. 1995) ("A Rule 27(a) deposition 'may not be used as a substitute for discovery.'"); rather, it authorizes the perpetuation of known evidence in the face of an averment

12. *See, e.g.*, Jonathan Krim, *A Story of Piracy and Privacy*, Wash. Post, Sept. 5, 2002, at E1 ("RIAA simply wants to warn the subscriber that he or she is violating the law."); *Verizon, Music Industry Argue Over Internet Privacy*, Bloomberg News (Oct. 4, 2002) (Cary Sherman, President of RIAA, stating: "It is a procedural burden to have to file litigation against people just to find out who they are, especially when you might have been able to achieve the same result with just a warning notice.").

as to its imminent loss. Thus, the petitioner must put forward "the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it." Fed. R. Civ. P. 27(a)(1), 27(a)(3) (the court must be "satisfied that the perpetuation of the testimony may prevent a failure or delay of justice"); *see Ash v. Cort*, 512 F.2d 909, 911 (3d Cir. 1975) ("Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost."). Again, the lower court recognized that these subpoenas were not (and could not be) supported by such an averment of imminent loss. Pet. 69a.[13]

Third, Rule 27 requires notice to the potential adverse party (the defendant in the promised civil action) and the initiation of adversarial proceedings before any judicial process issues. The proceedings cannot be *ex parte*—the petitioner must notify each "expected adverse party," and if notice is impossible, the court must appoint a lawyer to represent their interests. Fed. R. Civ. P. 27(a)(2).[14] It is in essence a lawsuit for perpetuation of testimony, with all the elements of a case within the subject matter jurisdiction of the court pled in the petition. *See Arizona v. California*, 292 U.S. 341, 347-48 (1934) ("The sole purpose of such a *suit* is to perpetuate the testimony." (emphasis added)). By contrast, Section 512(h) does not require any notice to the real party in interest (the anonymous subscriber) and authorizes an

13. RIAA made no such averment of imminent loss in its subpoena request, and none is required by the statute. Moreover, such an averment would have been impossible in this case, for the undisputed record facts are that Verizon preserves the relevant data.

14. This was the rule regarding the equity antecedents to Rule 27 as well. *See, e.g., Green v. Campagnia Generale Italiana di Navigation*, 82 F. 490, 494 (S.D.N.Y. 1897) ("Counsel have not referred me to any authority, however, nor have I been able to find any, for proceeding in equity under any circumstances by mere *ex parte* petition to take depositions in *perpetuam rei memoriam*, without any bill filed, or process issued or served on the defendants in interest.").

ex parte issuance of binding judicial process. Notice to subscribers is impracticable in any event where RIAA or other copyright owners or their representatives request the issuance of thousands of subpoenas and demand "expeditious" compliance.

Finally, a suit to perpetuate testimony has roots in equity that predate the Constitution itself. By contrast, the issuance of an *ex parte* subpoena *duces tecum* to a third party to discover facts unconnected to any case or controversy has no common law or equity roots at all. It is, as the district court candidly conceded, an "innovation." Pet. 60a.

As interpreted and applied in these two subpoena actions, Section 512(h) purports to authorize a private party to bring to bear the full coercive power of the federal district court to investigate facts unconnected to any pending (or promised) case or controversy within the subject matter jurisdiction of the court. RIAA has consistently maintained that its primary use of this statute will not be to sue potential infringers, but rather to issue warnings to subscribers enunciating RIAA's legal position on the use of peer-to-peer software. The courts and their clerks are thus reduced to the role of a "private investigator," facilitating the business communications of a particular sector of the economy. This is not analogous to Rule 27 or any other accepted judicial device, and if it is upheld it will open the door to countless other non-judicial assignments for the Judicial Branch—at the district court, appellate, or Supreme Court level.

B. These Subpoena Matters Squarely Present the Important Question Whether the DMCA's Novel Subpoena Device Can Be Applied Outside of a Pending Case or Controversy.

Verizon believes that RIAA's petition should be denied for all of the reasons stated in Verizon's opposition. If the Court concludes that it should use its scarce resources to

resolve the statutory question presented by RIAA's petition, however, it should also grant Verizon's cross-petition in order to resolve the entire controversy surrounding use of the novel DMCA subpoena device to obtain the personal information of individual Internet users without filing a lawsuit and without any judicial supervision.

First, the Article III issue has been raised in every matter involving RIAA's attempt to use the DMCA to obtain the personal information of individual Internet users, *see*, *e.g.*, Pet. 53a, 59a-75a; *supra* n.2. Accordingly, this issue is as much a part of finally resolving whether RIAA can continue its DMCA subpoena campaign as is the statutory issue on which RIAA seeks certiorari. In other words, a ruling from this Court regarding the presence of statutory authority is meaningless for purposes of final resolution of the validity of RIAA's subpoenas without a decision on whether a statute can authorize a federal court to issue compulsory process to a private party outside the bounds of a case or controversy.

Second, the issue presented is a substantial one, calling into question the constitutional validity of an unprecedented investigative tool created by Congress to circumvent Article III's adversarial process and the traditional legal means for identifying otherwise anonymous individuals. The only judicial ruling on this issue, the second decision issued by the district court below, Pet. 55a-111a, conflicts in numerous respects with the decisions of this Court and principles recognized by individual members of this Court. *See supra* Part I.A.

Third, these subpoena matters squarely present this substantial constitutional issue. The issue was fully briefed before both the district court and the D.C. Circuit; the district court heard argument on this issue in two separate hearings and then addressed the issue in two separate decisions; and the D.C. Circuit acknowledged the significance of the issue

in the questions posed at oral argument and preserved it as a potential alternative ground for affirmance in its opinion, Pet. 2a n.1. Only this Court can definitively resolve the Article III issue.

The record on the Article III issue in the courts below is every bit as fully developed as the statutory issue presented by RIAA's primary petition. This Court has before it a lengthy district court discussion of the issue, and the Article III issue was fully briefed and extensively discussed at oral argument before the D.C. Circuit. *See* Cross-Pet. App. 3a-45a. Indeed, this Court has repeatedly confirmed that it will consider "*any* ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *see, e.g., Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994).

Finally, the deleterious effects on the Judicial Branch and separation of powers that would ensue in the interim if this Court were to reverse the D.C. Circuit on the statutory issue but merely remand the constitutional issues for further review counsel in favor of resolving both the constitutional issues and the statutory issues simultaneously. As explained above, in the relatively brief period between the time the district court's enforcement orders became effective and the D.C. Circuit's reversal of those orders (a little over six months), RIAA alone sought and obtained approximately 4,000 subpoenas under the purported authority of the DMCA. These subpoena requests drained and diverted scarce Article III resources. *See supra* at pp. 22-23. Thus, this Court should, if it grants RIAA's petition, also grant this cross-petition to serve judicial economy and preserve the resources of the federal courts from the thousands and potentially tens of thousands of disputed DMCA subpoena enforcement proceedings that would surely be the result of a new RIAA DMCA subpoena spree.

C. This Court Should Consider the Article III and Separation of Powers Issues Regardless of Whether It Grants this Conditional Cross-Petition.

Verizon believes that this Court can and should consider the Article III and separation of powers issues as an alternative ground on which to affirm the D.C. Circuit's judgment—remanding the matters to the district court to vacate its order granting RIAA's motion to enforce the first subpoena and granting Verizon's motion to quash the second subpoena, Pet. 17a. Because of the remote possibility that a favorable ruling on the Article III issue could require a technical change in the D.C. Circuit's judgment (namely, dismissal of both motions without disposition), and because a ruling on the Article III issue would render Section 512(h) unconstitutional as applied to *any* function performed by service providers (arguably different or broader relief), Verizon respectfully submits this conditional cross-petition to ensure that, if the Court decides to hear this case for any reason, it will have the maximum flexibility in resolving all the statutory and constitutional issues litigated below. Alternatively, if the Court concludes that a cross-petition is unnecessary in these circumstances, it can and should include the Article III question in any order granting RIAA's petition for certiorari.

CONCLUSION

For the foregoing reasons, Verizon respectfully submits that if this Court grants RIAA's petition for certiorari in No. 03-1579, it should also grant this conditional cross-petition for a writ of certiorari in order to fully address the constitutional validity of the DMCA subpoena provision.

Respectfully submitted,

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June 25, 2004

APPENDIX

APPENDIX A

ARTICLE III OF THE UNITED STATES CONSTITUTION

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Appendix A

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX B

TRANSCRIPT OF SEPTEMBER 16, 2003 ORAL ARGUMENT AT THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 03-7015 & 03-7053

RECORDING INDUSTRY OF AMERICA, INC.,

Appellee,

v.

VERIZON INTERNET SERVICES INC.,

Appellant.

Tuesday, September 16, 2003

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CHIEF JUDGE GINSBURG, CIRCUIT JUDGE ROBERTS, AND SENIOR CIRCUIT JUDGE WILLIAMS

Appendix B

CONTENTS

ORAL ARGUMENT OF:	PAGE
Andrew G. McBride, Esq. On Behalf of the Appellant	5a
Donald B. Verrilli, Esq. On Behalf of the Appellee	20a
Scott R. McIntosh, Esq. On Behalf of the Intervenor	33a
Andrew G. McBride, Esq. On Behalf of the Appellant — Rebuttal	42a

Appendix B

PROCEEDINGS

[7] THE CLERK: Stand, please. Oyez, oyez, oyez. All persons having business before the Honorable United States Court of Appeals for the District of Columbia Circuit are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court. Be seated, please.

Case number 03-7015, *et al.*, the Recording Industry Association of America, Inc., versus Verizon Internet Services, Inc., Appellant. Mr. McBride for Appellant, Mr. Verrilli for Appellee, Mr. McIntosh for Intervenor.

ORAL ARGUMENT OF ANDREW G. McBRIDE, ESQ. ON BEHALF OF THE APPELLANT VERIZON INTERNET SERVICES, INC.

Good morning, Your Honors. Andrew McBride on behalf of the Appellant, Verizon Internet Services.

Your Honors, these appeals are not just about RIAA, and [8] they are not just about peer-to-peer file sharing. Anytime anyone in this courtroom sends an e-mail or browses a website on the Internet or participates in a chat room, a numeric IP address is used to route that communication, and it becomes accessible to others. In fact, this Court's own website notes that it gathers the IP addresses of those who visit it and has a privacy policy for their protection. At the same time, whenever you browse a website or read an e-mail, your computer makes an electronic copy of that content you're reviewing, making you —

Appendix B

JUDGE ROBERTS: Mr. McBride, the case is about a fellow who made available 600 separate copyrighted works for sharing with others.

MR. McBRIDE: I think the case is about a good-faith allegation by an agent of a copyright owner that such occurred without being able to hear from the subscriber themselves, and I think the important point is that the procedures here do not allow the subscriber notice before their identity is taken away, and the entire structure of the subpoena provision is tied to a particular type of material, and that is material that resides on the service provider's [9] system. There are three separate cross-references —

JUDGE ROBERTS: But is there any legitimate purpose for making available for copying 600 copyrighted works?

MR. McBRIDE: Well, we don't know in fact how those works got on the computer. Our point is they could have been downloaded from CDs. Our point is that the statute was not intended to reach material that is located on your personal computer, and I think the key is (h)(4). (h)(4) says basis for issuance of subpoena, and it says that the subpoena to be effective has to be accompanied by a notice under Section (c)(3)(A) that satisfies the provisions of Section (c)(3)(A). That is the jurisdictional prerequisite for an issuance of a subpoena, and RIAA says that replaces the case or controversy. Certainly, a jurisdictional prerequisite to invoke the jurisdiction of the Court should be narrowly construed.

JUDGE WILLIAMS: I'm glad we're on jurisdiction now, because that's usually the first issue. In the second case, you moved to quash, right?

MR. McBRIDE: That's correct, Your Honor.

JUDGE WILLIAMS: Now, you weren't arguing that the [10] district court did not have jurisdiction to entertain that?

MR. McBRIDE: No, I think *Marbury* teaches us the Court always has jurisdiction to look at its jurisdiction.

JUDGE WILLIAMS: Well, its jurisdiction?

MR. McBRIDE: Its —

JUDGE WILLIAMS: I mean, aren't there, there are two separate activities here, one being the clerk issuing the subpoena, the other being the Court ruling on the motion to quash. Suppose the subpoena came from outer space, there were a motion in federal district court between the person who had sought the subpoena and the person subject to the subpoena. Is there a case of controversy problem there?

MR. McBRIDE. Well, I think the answer here is that the subpoena is issued by the clerk in the name of the Court.

JUDGE WILLIAMS: I understand that —

MR. McBRIDE: And carries the Court's enforcement authority with it the moment it is issued.

JUDGE WILLIAMS: Let's assume that the initial subpoena is just dreadful from every possible jurisdictional point. You invoke the jurisdiction of the district court to quash it, right?

[11] MR. McBRIDE: That's correct.

JUDGE WILLIAMS: And you aren't repudiating that invocation, right?

MR. McBRIDE: I am not in the sense that *Marbury* always allow the Court to consider its jurisdiction.

JUDGE WILLIAMS: Well, as we have — well, I think it's more than its jurisdiction. You keep aggregating the two different propositions, issuance of the subpoena and quashing the subpoena, that the motion to quash, which you've sought, which you filed, is something within the jurisdiction of the Court, right?

MR. McBRIDE: Well, I think it is in the sense —

JUDGE WILLIAMS: And it's the, I mean —

MR. McBRIDE: If I —

JUDGE WILLIAMS: You raise issues.

MR. McBRIDE: I raise —

JUDGE WILLIAMS: Article III issues, but you also raise statutory issues about the issuance of the subpoena.

MR. McBRIDE: That's correct, Your Honor.

JUDGE WILLIAMS: But if the district court had jurisdiction over the motion to quash, it can resolve that on [12] any ground that's suitable, right?

MR. McBRIDE: Well, I don't think I've conceded the jurisdiction even in my jurisdictional statement here, but I think I'm allowed to defend against the subpoena. I don't have to take the position of a contemner. I can come in and say there's no Article III authority, and I would point out, I think, Your Honor —

JUDGE WILLIAMS: You're saying there's no Article III authority to issue the subpoena, I understand that.

MR. McBRIDE: Or enforce the subpoena.

JUDGE WILLIAMS: Let's assume you're —

MR. McBRIDE: And a motion of —

JUDGE WILLIAMS: Let's assume you're right on that. But you are not saying, and it seems to me very hard for anyone to say, that there's no jurisdiction to entertain the motion to quash the subpoena.

MR. McBRIDE: That's correct, and I think that's right. That's just like *Marbury* entertaining whether or not the writ of mandamus lies and then entertaining the question of whether or not that would exceed the original jurisdiction of the Supreme Court or the appellate jurisdiction.

[13] JUDGE WILLIAMS: I don't think it's the same thing, because there you're talking about jurisdiction over the same act. Here, there are different acts. One is the issuance of the subpoena, the other is quashing the subpoena.

MR. McBRIDE: But I think our point for Article III is unlike any other scheme, here the subpoena is issued in the name of the Court and enforced in the name of the Court for the benefit of a private party, and the private party doesn't invoke the jurisdiction of the Court to say adjudicate an issue of federal of law for me, it says give me a piece of process on an ex parte basis. The evidence is then handed over to the private party for use as they see fit. It's not used in any adjudication of any issue of federal law.

I'd like to get back to the statute, if I could, for a moment, because I think the statute is jurisdictional. I think under *Steel* case, the Court could address the statute or Article III, because both of those go to the jurisdiction of the Court to issue or enforce the subpoena, and the (h)(4) provision, basis for issuance of subpoena, refers back to (c)(3)(A), and it says that the notice that's filed with the [14] Court and served on the service provider must satisfy the provisions of (c)(3)(A).

Now we look at (c)(3)(A). (c)(3)(A) says to be effective under this subsection, subsection (c), the notice must contain certain elements. One of those elements is that it must identify the material to be removed or access to which is to be disabled, and it must provide information sufficient to allow the service provider to find and examine the material, to locate the material, but —

JUDGE ROBERTS: Well, the service provider can disable access to the infringing material simply by terminating the infringer's account.

MR. McBRIDE: But Congress used very different language in different sections of the statute with different predicates for that. If you look at (j), the injunctive relief provision, it mentions terminating the account of a subscriber, disabling access, or removing material as a surgical device where the website is under the control of Verizon, as Verizon hosts a number of websites, unlike the laptops here, where Verizon cannot gain access to the individual subscriber's material on the A drive, which is [15] where this KaZaA material resides. Remove, Verizon could remove five infringing pictures from a large website, disable access to. Verizon could take, temporarily take the website off the Internet, and in the (g) provision, Congress made clear that that was a temporary measure. The service provider then gives notice to the person whose material has been taken down, and at that time there's a dialogue, and there can be a counter-notification and the material can be placed back. But the kind of material that's referenced in the take-down notice provision in (c)(3)(A) doesn't exist, and in the second section it talks about material at an online site, and I think that's a very inapt description of a personal computer. The legislative —

JUDGE GINSBURG: Mr. McBride, stay with your, just back up a sentence or so. Under your reading of this, it would seem, in which you're requiring very strict compliance, that is to say, with each of the elements in the notice, it would seem that if somebody posted copyrighted material to their website for a limited period of time and thereafter the company, the carrier receives a notification, but the material's already been removed, they would no longer be any [16] obligation to say who had posted it.

MR. McBRIDE: Well, I don't think that's accurate, Your Honor, and that's actually covered in (h)(5), because regardless of whether we respond to the notice in a (c) situation, we must respond to the subpoena. And I think that, the take-down and notice procedure throughout the legislative history of the statute itself is the primary remedy. Take material down quickly that's infringing. There's an ancillary identification provision that's tied by three express references and numerous implicit references in Section, subsection (h) to the take-down procedure. The one thing we know about the (a) function, the conduit function, where Verizon simply sends material between users' own personal computers, there is no take-down notice. Congress made a conscious decision not to put any notice that could form the basis for a subpoena in the conduit section. And that makes sense, because the service provider cannot be responsible for the material on a personal computer of an individual Internet user. It can't access that material, it can't do what the legislative history says that the take-down provision was designed to do. It says it was allowed —

[17] JUDGE ROBERTS: Well, Mr. McBride, it can disable access to that material by terminating the account.

MR. McBRIDE: But I think that analysis, (a) does not give the statutory language disable or remove the meaning it has throughout the statute, and throughout the entire 512, that language, disable or remove access to, is used with material that's hosted by the service provider that's available to the service provider. You look at (j) and you look at (i), termination of accounts. Very different language, can't be equated as the same thing, and in fact RIAA concedes the

notices that were served with these two subpoenas require nothing under the statute. Verizon didn't have to respond because there's no such thing as a take-down notification in the (a) context.

Now, how could Congress have tied this whole subpoena mechanism to the take-down provisions and then said that a meaningless take-down notice somehow satisfies the provisions of (c)(3)(A)? I think this reading makes the entire statute coherent. Their reading doesn't. And I think that's absolutely clear. You've got statutory anomalies that they've never been able to solve when you extend the subpoena [18] power to a place where there is no take-down notice. If you keep it within the take-down notice, within material under the service provider's control, everything makes sense. Even the reference to Rule 45 makes sense, because the service provider has access to the material and might actually be able to mount a defense, whereas, you know, we can't mount a defense for an individual subscriber. We don't have access to your home computer, nor should we. In fact, subsection (m) of this statute says Verizon should not be monitoring, ISPs should not be forced to monitor e-mail, web browsing, personal, private activity from your own computer. The fundamental difference between that and a user saying he's my website, Verizon, please host it on your server, it's the difference between billboards and a private telephone, and a private telephone —

JUDGE ROBERTS: The difference when Congress passed the statute, you didn't have the P2P technology that made the conduit functions present such a threat of piracy. You had the situation where you would post on a website.

That was the situation that posed the threat. The technology has now sort of eliminated that middleman, and my question is why [19] shouldn't we read the statute to apply to address the problem that Congress was concerned about, which is, of course, the copyright piracy?

MR. McBRIDE: S-O-N-Y. *Sony*, number one. Not for this Court or for the lower court to take a statute written to address one problem in the area of copyright and expand rights to others. There's a balance here. There are not only the interests of copyright owners. There's the interests of my client and the interests of millions, a hundred million people who use the Internet. This statute reflects a careful —

JUDGE ROBERTS: What is the interest of your client?

MR. McBRIDE: The interest of my client is in protecting our subscribers' privacy, privacy that we value and that is essential. Our subscribers —

JUDGE ROBERTS: You make a lot of money off of the piracy, don't you? I mean, in the sense that the people who are engaged in that activity use the higher-end services that you offer, that are more expensive.

MR. McBRIDE: That is a canard and I think it [20] should be rebutted now, and firmly. Verizon doesn't condone copyright infringement. We have no relationship with KaZaA or any of these other groups. We promote legitimate, paid music sites on our website, and we make money from that. When someone uses Rhapsody or MP3, we have arrangements with them. That's how we make money.

We don't make money when people use bandwidth to trade music in an unauthorized manner. We make money when they download music from the sites that we feature.

And I would also point out the idea that this is what's driving broadband, P2P, I think the Court well knows that Congress has always promoted, and the FCC, the development of broadband for numerous applications and that it's an important Congressional interest that broadband be promoted.

And I would point out also, Judge Roberts, in terms of the solution, Congress knew this statute wasn't the whole solution to the entire problem in (i). It specifically alluded to technological solutions that might be down the road, but I don't think it's for the Court, the district court recognized P2P wasn't a glimmer in the eye of Congress when it passed this statute. And the statute makes sense in [21] that regard.

JUDGE GINSBURG: Well, why do you say that? There was, I mean, it was the subject of news articles at that point.

MR. McBRIDE: Not P2P, Your Honor. Napster came into existence in '99, and P2P like this, KaZaA, was 2000. This did —

JUDGE GINSBURG: Well, the vehicle, then, was a file transfer protocol, right?

MR. McBRIDE: File transfer —

JUDGE GINSBURG: But it was the exact same problem.

MR. McBRIDE: I don't think it was, Your Honor, and I think if you read the legislative history through, the first thing you'll see is there's no mention of file transfer protocol. The conduit —

JUDGE GINSBURG: Well, you were suggesting a moment ago that this was just not even, you know, part of the universe in 1998.

MR. McBRIDE: Well, I think —

JUDGE GINSBURG: But the statute was passed at the end of the year. In March of that year, there's an article [22] in Salon, I think it is, that has, it talks about exactly this problem. The vehicle again was FTP, but it was talking about songs being downloaded, run, students in dormitories and colleges and so on using this device, and how much worse it's going to be in the future.

MR. McBRIDE: Well, I think the important point here is file transfer protocol is a computer language, just like HTTP. Neutral by itself. I think the question is the architecture that Congress was looking at in 1998 was the client-server architecture. The majority of infringement was actually software and it was downloaded from websites hosted by someone. It's like a wheel with spokes. This new architecture is like a fisherman's net, where every computer is both a server and a client. That did not exist. The conduit functions that Congress mentioned in the legislative history were e-mail and web browsing. And two points about those —

JUDGE GINSBURG: Well, now, here's exactly what it said on that point in March of '98. When cable modems are rolled out across the country, it will be easy for any regular home user to turn their own computer into an FTP [23] server offering MP3 files at very fast speeds. Thousands of new servers could pop up daily, creating a nightmare for record companies. Even today, an FTP site can have its IP address reassigned and not be found again for weeks. That's exactly what happened.

MR. McBRIDE: That's a news article, Your Honor. I would have to say that I would rely more heavily on the House and Senate reports to the actual legislation that discuss only e-mail and web browsing in the context of the conduit functions and discuss the infringement as piracy websites or online sites. So I don't think Congress any intent on this issue. Why is there no take-down notice in (a) if the conduit functions were seen as a problem? (a) has no take-down notice, and it has no requirement that the service provider not have actual or constructive knowledge of infringement. Congress knew (a) was different.

And I would point out even in Title 1 of the statute, which is about technological measures for the copyright owners to protect themselves, Congress built in Section 1205, privacy protection, and said even where the copyright owner is using some technological device, that device should not be [24] able to disclose the identity of individual users. And for RIAA to argue that in Title 2 Congress then created this sweeping subpoena power over the whole Internet.

And I would point out in that regard in terms of the First Amendment issue, the scope of copyright is unlimited. We know that. It's any expression, an e-mail, of any content, political, social commentary, anything, and I think the Supreme Court made quite clear that anonymous speech and association are important. And the fact of dissemination does not give up that right. The Federalist Papers were widely disseminated on a pseudonymous basis, and a statute that said, a statute that said Mark Twain could not publish as Mark Twain but had to give his name as Samuel Clemens would clearly violate the First Amendment. Here, that power is given to a private party based on what? An ex parte filing of a good-faith belief that someone's rights have been violated. Not a reasonable belief. Not a Rule 11 belief based on investigation, but a good-faith belief. What happens after that? The burden shifts not to the speaker but to the ISP to defend, and the ISP doesn't have access to the material. Now, that makes no sense at all, and I think it [25] points you —

JUDGE ROBERTS: You don't doubt, though, Mr. McBride, that the vast majority of the P2P activity is illegitimate copyright piracy, do you?

MR. McBRIDE: I disagree with that, Your Honor, and so does the Central District of California, which found under *Sony* that the distribution of this software was not contributory or vicarious infringement, because, in the words of Sony, it had substantial non-infringing uses.

JUDGE ROBERTS: The software, but the vast majority of the activity using the software is the exchange of copyrighted material.

MR. McBRIDE: And if that were so, and I don't think it's proven that, so, I mean, in this very record, Verizon did a demonstration where we downloaded the speeches of Martin Luther King. Anything can be exchanged on the software. I mean, Microsoft Word can be used for a number of infringing uses, but that doesn't mean that the product itself is somehow a contributory infringer, nor does it mean that Congress would authorize subpoenas to examine the contents or your Word files to determine if they're [26] infringing. I mean, in this sense, this is the VHS recorder. It's a new technology, and always with a new technology the copyright owners scream bloody murder and say, my God, you know, all the way from the piano roll to the VHS recorder. This statute was not meant to address that.

In fact, Congress is addressing peer-to-peer now. The Judiciary Committee held hearings last week. The Senate Commerce Committee has a hearing this week. The proper course when this statute was clearly written with other things under mind under *Sony* is to let Congress do its job and not try and extend the statute at numerous costs to values that Congress expressed in the statute itself. Thank you.

JUDGE ROBERTS: Mr. McBride, you've used your time, but we will give you a couple of minutes for rebuttal.

MR. McBRIDE: Thank you.

Appendix B

ORAL ARGUMENT OF DONALD B. VERRILLI, JR., ESQ. ON BEHALF OF THE APPELLEE RECORDING INDUSTRY ASSOCIATION OF AMERICA

[27] Good morning, and may it please the Court. By its terms, Section 512(h) requires Internet service providers to respond to subpoenas whether or not they are storing infringing material on their networks. That is what the statute says, and it is the only sensible reading of the statute. Congress would have had no reason to require service providers to provide us the identities of subscribers who infringe by storing material on computers on the service provider's network but to exempt service providers from giving us the identity of subscribers who infringe by using computers attached to the network. In —

JUDGE ROBERTS: Well, Congress saw a distinction between the two categories, because there is no take-down notice required under (a). There is under (b) through (d), and (h) refers to the take-down notice, so a logical explanation of that is that the subpoena power in (h) doesn't apply in the (a) situation.

MR. VERRILLI: I don't think so, Your Honor, I will work through the specifics of the statutory text, but permit [28] me to make a more general point first, and it's this. Subsections (a) through (d) define service, the service provider's own obligations and provide circumstances in (b), (c), and (d) where the service provider will lose the safe harbor that Section 512 otherwise gives it from secondary copyright infringement liability. And it makes sense to have

different rules in a situation where what you're talking about is the service provider's potential liability. It doesn't make sense to have different rules when what you're talking about is the obligation of the service provider to respond to a subpoena, and the reason for that is that we don't serve the subpoena so that we can enforce rights against the service provider. We serve the subpoena so that we can enforce rights against the infringing user of the system. And in that situation, the only way that we can assert our rights against an infringing user is if we know the identity of the infringing user. The only entity that knows the identity of the infringing user is the service provider. That's true when the material is stored on the service provider's network. It's true when the material is on the home computer. It's equally true.

[29] JUDGE WILLIAMS: That may make a lot of sense as a policy matter, but in terms of interpreting the language of Congress, I'm not sure it helps us much. To the extent that Congress clearly drew a distinction between removing infringing material on the one hand and cutting off access to a particular subscriber on the other, as it appears to have done, it looks as if it didn't create this authority for the current problem.

MR. VERRILLI: I respectfully disagree with that reading of the statute, Judge Williams. I don't think there's any doubt that as a matter of plain English and common sense that an Internet service provider can disable access to infringing material by terminating the subscriber who has the infringing material on his or her computer.

JUDGE GINSBURG: Well, that's a peculiar way of phrasing it, since they've talked elsewhere about terminating the subscriber, right? So disabling access and terminating the account seem to be different concepts.

MR. VERRILLI: Well, that's right. But I do think, I think they can be different concepts, but I do think that as a matter of plain English termination is a way of [30] disabling access, and after all, it's —

JUDGE GINSBURG: Now, wait a minute. You disable access to the material. You terminate the account.

MR. VERRILLI: That's —

JUDGE GINSBURG: Now, one may accomplish the other, but they are separate approaches that have been adopted at different places in the statute.

MR. VERRILLI: That's correct, but I think the key is that it does accomplish the other, and therefore this is, after all, I think —

JUDGE GINSBURG: Actually, what you terminate is the subscriber, not the account.

MR. VERRILLI: Well, that's right, but it does have the effect of disabling access to the infringing material, and therefore, as a matter of the plain language of subsection —

JUDGE GINSBURG: It has the effect of disabling access to everything, infringing or not infringing, right?

MR. VERRILLI: Including the infringing material, that's correct.

JUDGE GINSBURG: Yes, including that. So disabling [31] access to the material is a narrower concept.

MR. VERRILLI: It can be a narrower concept, but —

JUDGE GINSBURG: How can it be anything other than a narrower concept?

MR. VERRILLI: Well, it is a narrower concept, but it is still the case that that obligation, to the extent there is one in subsection (c)(3), is satisfied, because we've identified material that is infringing and that access to which could be disabled if it were terminated.

And I think, I do think that the key point here is that this is a significant over-reading of the role that subsection (c)(3) plays in defining the service provider's obligations. (c)(3), it doesn't function anywhere in the statute to define the substantive duties of the service provider. It is a notification provision. Its function is to put the service provider on notice that it has obligations under the statute. That's true when it's used in subsection (b) and it is used in subsection (b). It is true when it's used in subsection (c). It's true when it's used in subsection (d). And it's true when it's used in subsection (h). But in none of those four circumstances does the (c)(3) [32] itself define the scope of the obligation. The scope of the obligation —

Appendix B

JUDGE ROBERTS: Well, but the subpoena only issues if, quoting under subsection (4), if the notification satisfies the provisions of (c)(3)(A).

MR. VERRILLI: Yes, and it does in this case, of course, because there are six requirements in (c)(3)(A). And there's no doubt, there's not even a dispute with respect to five of the six. It's clear that, it was a matter of plain English, we satisfied the sixth of the six. It's also clear in (c)(3)(B) that you satisfy (c)(3)(A) on the basis of substantial compliance, not —

JUDGE ROBERTS: Well, one of the things that (c)(3)(A), I think it's (A), talks about is an online site, and don't you have to read online site to mean my computer to apply it in the subsection (a) situation?

MR. VERRILLI: Well, I think, several responses to that. The word online site is preceded by the words or if. I mean, it says identify the infringing material, or if it's on an online site, multiple requirements, so I think the answer is no.

[33] JUDGE ROBERTS: Well, it says or if there are more than one on the online site.

MR. VERRILLI: Right.

JUDGE ROBERTS: I read that as meaning that that subsection (c) applies to an online site.

MR. VERRILLI: But beyond that, Your Honor, you're online, you're an online site when you're connected to their network, and it's —

JUDGE WILLIAMS: Have you found any actual usage of the term to mean that? I mean —

MR. VERRILLI: Yes.

JUDGE WILLIAMS: — I explored Google and got 344,000 hits, which I did not pursue further except for the first 50. I was wondering if you came up with one.

MR. VERRILLI: Well, the statute, in subsection (j) of 512 —

JUDGE WILLIAMS: Onsite location, I think —

MR. VERRILLI: — it says onsite location. That seems synonymous to me, an online site and online location, and in (j) it seems, it is by definition clear, because it's used in describing subsection (a) functions that an online [34] location is something other than a location on the subscriber's system. And so I think online site, online location are just synonymous, and so I don't think it has the meaning that the claim it does.

And I think (h)(5), far from supporting Verizon's position on this, makes clear that our reading of the text is correct, because what subsection (h)(5) does is uncouple the duty to respond to the notification from the duty to respond to the subpoena. And that's because they're two different things there in the statute for two different reasons. In (h)(5), the service provider is obligated to expeditiously respond to the subpoena even if it does not respond to the notification. And what that says is that even if the service provider decides

that it is not obliged to engage in a take-down because, for example, the material doesn't reside on its network, it's still independently obliged by operation of (h)(5) to respond to the subpoena. Congress expressly decoupled the two obligations.

JUDGE ROBERTS: Well, what is the purpose in a subsection (a) case, what is the purpose of the (c)(3) notice?

[35] MR. VERRILLI: The purpose of the —

JUDGE ROBERTS: Why would you require one in a subpoena for subsection (a)?

MR. VERRILLI: Because, it's for a functional reason, Judge Roberts. What the (c)(3) notice in the subpoena context is put the service provider on, you have to, there's six things in a notice. You have to identify yourself, you have to identify the material that you claim has been infringed, and you have to identify the material or activity you claim is infringing. You have to make the good-faith representation about your purposes. You have to tell them how to get in touch with you. It has a functional role under this statute, and it has a functional role under the subpoena. It says to —

JUDGE ROBERTS: But one function it doesn't have is requiring the service provider to do anything, right?

MR. VERRILLI: That's correct. Well, to do anything with respect to taking down the material. It's a prerequisite to them responding to the subpoena, and what it does, it's the mechanism that provides them the information they need

to match the IP address that we give them with the [36] actual subscriber and give it back to us, and it provides an assurance under the statute that indeed there is infringing activity going on and that this request is justified. So there's a very clear function that it's playing the role of putting the service provider on notice, which is the same exact role it plays under (b), (c), and (d). It plays that same role under all four.

JUDGE WILLIAMS: Can we go back to the relationship between (c)(3)(A)(iii) and the rest of the statute? There it talks of material, then I'm skipping, access to which is to be disabled. And then in (j)(1)(A), we have two different types of remedial orders. One, an order restraining the service provider from providing access to infringing material. Now, that seems to match the earlier language, the language in (c)(3)(A). Then we go on to this completely different thing, item 2, and what is the point of that on your theory? Because on your theory, disabling access encompasses shutting down a subscriber, right?

MR. VERRILLI: Well, one way, it's not the only way to disable access, but it's one way to disable access.

JUDGE WILLIAMS: Well, but, if, I mean, it [37] certainly suggests that these two propositions were viewed quite differently.

MR. VERRILLI: Well, but I think, Your Honor, if one understands the functions of the (c)(3) as a notification device triggering other obligations, then I think that the —

JUDGE WILLIAMS: But you're in the position of saying that the (c)(3) notice used here doesn't have to match the language of (c)(3), which seems to me a difficult proposition.

MR. VERRILLI: Well, we think it does match the language of (c)(3) for the reasons I've given. We think in —

JUDGE WILLIAMS: But that's only if the relationship between removal of material and termination of a subscriber is the relationship that you say it is.

MR. VERRILLI: And we also think that all that's required is substantial compliance, and substantial compliance has got to be measured in terms of the function that the notification provides, which is to allow them to respond to the subpoena in our case. We also think that that would make hash out of the fundamental goal of this statute. [38] After all, the point of the subpoena is to allow us to enforce our copyrights directly against the infringers. What the Internet service providers wanted out of Section 512(h) was not to be held responsible when they're passive conduits. What they gave in return is cooperation with us so that we can enforce our rights directly. If this reading of the statute is correct, the consequence is that we are disabled from enforcing our rights against the copyright owners directly, because we don't know who they are, and the only one who can tell us who they are is the service provider.

And if I may go back to the question of what was in the mind of Congress in 1998 when this act was passed, a few points. Although P2P was not yet a reality, there is no doubt

that Congress understood that infringement on the basis of home computers or servers operated independently and not as part of the network was a serious problem. That's reflected in the text of the statute itself. After all, Section (j)(1)(B) specifically provides for an injunctive remedy to terminate infringing subscribers when all that's going on is subsection (a) function. Had Congress been unconcerned about home computers and other servers being used [39] for infringement, that provision wouldn't be in there. Subsection (i), my friends at Verizon concede —

JUDGE GINSBURG: Excuse me, the one you just referred to was which?

MR. VERRILLI: (j)(1)(B).

JUDGE GINSBURG: (B), okay.

MR. VERRILLI: Subsection (i) similarly imposes on service providers providing (a) functions and all others the duty to have a policy of terminating repeat infringers and carrying out that policy, again reflecting Congress's concern.

JUDGE ROBERTS: But the underlying activity is very different in the subsection (a) situation and in, than it is in (b) through (d), and (b) through (d) you've got someone putting the stuff out there on a website for other people to copy. In (a), it's a very different situation. They're not putting it out. It's in their files.

MR. VERRILLI: Well —

Appendix B

JUDGE ROBERTS: The most that they're doing, it seems to me, is equivalent to my leaving the door to my library open. Somebody might come in and copy one of my [40] books, but that doesn't make me liable for copyright infringement.

MR. VERRILLI: I disagree with that, Your Honor. The point of this file-sharing technology is to make your material available for copying by others. The point of its predecessors, file transfer protocol, was to make the material available for copying by others, and Congress had before it testimony in 1998 from the Department of Justice and from the Register of Copyright that there was about to be an explosion of potential infringement on the basis of home computer use. So it isn't, and we've cited in the footnotes at page 17 and page 18 of our brief.

Now, I know, you know, that it's said that legislative history, using legislative history is like looking at the audience and picking out your friends. There is a difference here between our position and Verizon's. We have some friends to pick out in the legislative history. Verizon has made some assertions that this wasn't in the mind of Congress, and they cite precisely nothing to substantiate the proposition that Congress had no interest in infringement on the basis of home computer use. They plainly did. It's [41] reflected in the statute. It's reflected in the legislative history. And of course after all, what Congress is doing here is legislating for the future, legislating in an environment that Congress understood was going to be dynamic and understood, and the Congress understood very well that we were on the precipice of a massive explosion of infringing potential.

That is exactly what happened. We are being victimized to it to a staggering extent every day of the week. The only way we can repair that is if we can assert our rights directly. The only we can do that is if we can obtain the identities of the subscribers.

JUDGE GINSBURG: Mr. Verrilli, I'm going to ask you to clarify one procedural point. Once a subscriber has been notified that there's a subpoena, what is the process by which the subscriber can assert a defense, fair use or what have you?

MR. VERRILLI: Well, it seems to me the subscriber, once the subscriber has been notified, the subscriber has two options. The subscriber can intervene in an enforcement proceeding, in the subpoena enforcement proceeding and try to assert his or her rights there. That has happened. It's [42] happening now, in fact. And alternatively, the subscriber can assert the fair use defense in the copyright infringement action that results from us obtaining the subscriber's identity and suing to enforce our rights. So there's no sense in —

JUDGE GINSBURG: Does it first get terminated?

MR. VERRILLI: Excuse me, Your Honor?

JUDGE GINSBURG: Does the subscriber first get terminated and then assert the fair use defense?

MR. VERRILLI: If the service provider decides that the subscriber needs to be terminated, then the subscriber will

be terminated. Of course, in that situation, I disagree with my friend Mr. McBride in his reading of the statute. There are remedies. For example, under (f), if termination occurs as a result of a misrepresentation by the copyright owner, then the service provider, because we believe disable access and termination mean the same thing, then the service provider will have, then the, excuse me, the subscriber will have a damages remedy against us for the misrepresentation, and in subsection (g), if a termination like that occurs and it's unwarranted, it seems quite clear to us that the service [43] provider would have the immunity that (g)(1) provides. So I think, I think the statute, it is possible that that would occur, but of course the statute requires a policy of terminating repeat infringers, and it would seem to me a very extreme burden to say that someone has to be actually adjudicated twice of having committed copyright infringement before that policy would require them to be terminated from the system.

JUDGE GINSBURG: Further questions? Thank you, Mr. Verrilli.

Appendix B

ORAL ARGUMENT OF SCOTT R. McINTOSH, ESQ. ON BEHALF OF THE INTERVENOR UNITED STATES OF AMERICA

Good morning, Your Honor. May it please the Court. My name is Scott McIntosh, and I'm appearing on behalf of the United States, which has intervened in this case to defend the constitutionality of Section 512(h). As you know, the [44] constitutionality of this statute is being challenged on two heading, Article III and the First Amendment. Let me begin with Article III.

JUDGE ROBERTS: Mr. McIntosh, I was a little surprised by the Department's filing that you didn't address the statutory interpretation question. I know that in the past the Department has intervened to defend the constitutionality and defended the constitutionality by explaining that the statute should be interpreted to avoid the constitutional question. Should I read some implication into the fact that you didn't do that in this case?

MR. McINTOSH: No, Your Honor, I should, let me just make clear that although we did not address the statutory issue in this case, it is the position of the Copyright Office that the district court correctly interpreted the statute in that it does apply both to subsection (a) and subsection (c). We directed our briefing to the constitutional question because that's the scope of our submission under 2403, and it doesn't seem to us to be an appropriate case to construe the statute differently to avoid constitutional questions. I say that both because we don't [45] think the constitutional questions are substantial ones and because we don't think

that construing the statute would eliminate the constitutional questions. They'd simply shift their locus from (a) to (c).

JUDGE ROBERTS: The Copyright Office doesn't get any deference in this case, does it, to its view of statutory interpretation?

MR. McINTOSH: Well, we haven't presented their views in the course of the briefing, Your Honor, so we're not asking for deference on that score. But it might be a different matter if we had presented them, but that's not, we're here to address the constitutional question.

JUDGE GINSBURG: Well, let me ask you about that, because you seem to be addressing only one of the constitutional objections that's been, Article III objections that's been raised, and there's something I'm not getting about your brief, I think. Your opening point being that we needn't resolve whether this subpoena issue involves an exercise of judicial power, is that correct?

MR. McINTOSH: Well, I guess our submission, Your Honor, is that if one believes that it does involve the [46] exercise of judicial power, then it's entirely appropriate within the scope of Article III for this function to be performed as it's provided under the statute. We haven't addressed the alternative theory of the district court, namely that one can sustain this as something other than an exercise of Article III judicial power.

JUDGE GINSBURG: Even if you're correct on that, does that respond to the objection raised, the separation of powers objection?

MR. McINTOSH: Well, I think the, if I understand the separation of powers objection, Your Honor, it is an objection which comes into play only if one concludes there is no exercise of judicial power here. If this is a case involving the judicial power of the United States, I don't think there's a separation of powers problem by definition. And, you know, to our mind, there's no more of a separation of powers problem here and no more of an Article III problem than there is any case, any garden variety case where a court issues a subpoena, pardon me, a clerk issues a subpoena under the provisions of Rule 45, which of course are integrated into the statutory provision.

[47] The way the statute is set up, the preconditions for obtaining relief, for obtaining a subpoena under Section 512(h) ensure that there will be an actual Article III controversy present when the subpoena is issued. As you know, the statute requires that there be an identification of an infringing work or of an infringed work, of infringing material. There has to be a good-faith determination on the part of the parties seeking the subpoena that rights have been violated and unauthorized use has taken place under the copyright laws. There has to be a sworn submission and submissions under requirements of perjury that information is being sought solely to vindicate rights under Title 17, solely to obtain the identity of the infringer, and that the party seeking the subpoena is authorized to act on behalf of the copyright owner. When you take all of those requirements and put them together, they ensure that what is present is an actual controversy between, arising under federal law, between on the one hand a copyright owner and on the other hand the alleged infringer.

JUDGE WILLIAMS: Putting all that aside, isn't it absolutely clear the district court had jurisdiction over the [48] motion to quash in the second case?

MR. McINTOSH: I believe it did, Your Honor. I believe that —

JUDGE WILLIAMS: And unlike *Marbury v. Madison*, it's, there are two separate activities, the issuance of the subpoena and the motion to quash the subpoena, whereas in *Marbury*, there was a quest for mandamus, and the question was what do they have to do before they even consider the merits of that.

MR. McINTOSH: I would think, Your Honor, that if one grants for purposes of analysis the underlying claims that are being pressed by Verizon in the course of its motion to quash, if one assumes that there is some constitutional deficiency on the part of the issuance of the subpoena, that it is within the scope of the Court or would be under the scope of the Court under Article III to entertain a motion to quash, because that calls on it to adjudicate a question of federal right. So I don't think, I don't think there's a separate constitutional question or issue there.

JUDGE GINSBURG: All right, now, if I could go back to your theory in the case, Mr. McIntosh. Is the key to your [49] position here that there is in the background sufficiently close to the courthouse a controversy over a federal issue, namely copyright?

MR. McINTOSH: Yes, Your Honor.

JUDGE GINSBURG: You seem to be instancing in your brief also statutes that authorize the Court to act with regard to matters over which there is no such controversy, and you gave us the foreign and international tribunals assistance provision.

MR. McINTOSH: Yes, 1782.

JUDGE GINSBURG: 1782. So in your theory, that's unconstitutional.

MR. McINTOSH: No, Your Honor, we have two, we have two alternative theories presenting. One is —

JUDGE GINSBURG: I would hope and trust that each of them would preserve all of the statutes, since that's your assigned role.

MR. McINTOSH: Well, my assigned role, Your Honor, is to protect the Constitution out of all the statutes, and I hope that we will manage to do that under one or another theory. When you have a statute like 1782, it seems to us [50] that it reflects, it embodies a mechanism for enforcing an obligation which Congress has created, an obligation to comply with, under appropriate circumstances, foreign subpoenas, foreign discovery process, and Congress has the power under Article I to impose such an obligation within the scopes of its powers under international commerce. And so what 1782 does is recognize that obligation and create a mechanism for enforcing it. And that's within the scope of Article III, because there is this inchoate obligation that Congress has recognized to assist in foreign litigation, and

the Court can exercise its powers under Article III to give force to that.

JUDGE GINSBURG: Inchoate troubles me here. It sounds like penumbras. In other words, you can't find it in the Constitution.

MR. McINTOSH: No, it's not so much in the Constitution, Your Honor. I think what you're seeing in 1782 is that two things are sort of being folded into one another. The obligation to assist and the mechanism for enforcing that obligation are sort of simply, you know, appear side by side in the same provision, which simply says the Court can enter [51] an order essentially compelling people to do these things under appropriate circumstances.

JUDGE GINSBURG: You wouldn't have any problem, would you —

MR. McINTOSH: I guess implicit, implicit might be a better word than inchoate, Your Honor.

JUDGE GINSBURG: That's getting somewhat better. Emanations is better than penumbras. You wouldn't have any problem with the Congress directing the clerks of the courts to sell stamps, would you? They have a postal authority?

MR. McINTOSH: No, Your Honor, I don't think that would be an exercise of judicial power.

JUDGE GINSBURG: Therefore what?

MR. McINTOSH: No, and therefore nothing in the sense that I don't think there would be any compatibility problem. You have a different constitutional question. It wouldn't be one of Article III and is this outside the scope of judicial power. It would be is this a function that can be assigned to clerks under the usual sort of incompatibility, separation of powers analysis.

JUDGE GINSBURG: Yes, we're back in the separation [52] issue.

MR. McINTOSH: Yes, that's correct. But here, here it seems to me when you have a subpoena of the sort that courts conventionally issue under Rule 45, when you have a subpoena that's issued in the name of the Court, that it fits comfortably into the conventional judicial role and a role that is conventionally entrusted to clerks in an administerial fashion.

JUDGE GINSBURG: Now, I think you stopped short of this a little bit in the brief, but I don't think there's anything inconsistent with this. Are you, are you basically instancing a distinction between a case and a controversy, saying here there's no case, it hasn't been filed, but there is a controversy in the disjunctive, Article III is satisfied?

MR. McINTOSH: Well, I'm hesitant to put too much weight on that. I'm not sure the Supreme Court has drawn a particularly dramatic distinction between cases on the one hand and controversies on the other. But what I think —

JUDGE GINSBURG: Right, but we do have two terms.

MR. McINTOSH: But we do have two terms. And [53] what's clear —

JUDGE GINSBURG: And there is no case, right?

MR. McINTOSH: Well, there is no suit.

JUDGE GINSBURG: Yes, that's what you say, you keep saying there's no lawsuit, right?

MR. McINTOSH: There's no suit, and that's, but of course that's true under Rule 27, for example, Your Honor. When I come into court under Rule 27 to get a discovery order to allow me to get information for use in some future litigation, there is no pending suit. But that doesn't mean there's not a sufficient case or controversy in the Article III sense to support the exercise of jurisdiction. And the same thing is true here as well. But the provisions of the statute ensure that there is a live controversy out there, one that's capable of being brought —

JUDGE GINSBURG: Well, if it were just a case, if you were here seeking that subpoena and you said there's no doubt that it was a case or controversy, because you're using the disjunctive, that seems irrefutably true. There's a controversy, but I don't see any case.

MR. McINTOSH: Well, I guess my view, Your Honor, [54] I'm happy, I suppose, to look at it either way. One can view them disjunctively as two separate things. One can also

say that case in the Article III sense is something broader than or not tied to the formalities of a civil action under the federal rules. And I think the Supreme Court's made clear in cases like *Hayworth* that once you have an Article III case or controversy, or case or controversy in the Article III sense, Congress has broad discretion in figuring out what kinds of procedures will be used the courts in connection with those. There's no need to use to the conventional attributes of a complaint, an answer, and so forth.

JUDGE GINSBURG: That's your Rule 27.

MR. McINTOSH: I'm sorry?

JUDGE GINSBURG: That's your Rule 27 argument, right?

MR. McINTOSH: That's, yes, that's correct, Your Honor.

JUDGE GINSBURG: Yes, okay, thank you. Any questions? Thank you. Mr. McIntosh.

Appendix B

[55] REBUTTAL ARGUMENT OF ANDREW G. McBRIDE, ESQ. ON BEHALF OF THE APPELLANT VERIZON INTERNET SERVICES, INC.

Your Honors, a couple of points. One, I think Judge Williams's point about the remedial provisions is irrefutable, that the remedial provisions divide two separate kind of remedies in (j), and one is termination of subscriber account, and the other one is disabling access to material on an online site. And I think that highlights the difference both between what an online site is and what a subscriber's account is and the scalpel of removing or disabling material from a particular website and the blunderbuss of terminating all Internet access of a particular subscriber. And I heard Mr. Verrilli say the notices in this case required no statutory response from Verizon. None at all. How can that be the notice that satisfies the provisions of (c)(3)(A)? It cannot. I heard a reference to Section (h)(5) of the statute, but (h)(5) contemplates a notice to which the service provider might well respond, because it says the service provider responds to the subpoenas regardless of its [56] response to the notice. But that can't be read to mean a notice to which the service provider would never have a statutory obligation to respond, and indeed, (h)(5) requires service of the notice at the time or before the time of the subpoena. Now, if the notice plays only an informational role, why would the notice ever be served before the subpoena? Under my friend's view, the only role of the notice is an informational one. But that's not what the statute says. And that gives two different meanings to the same notice in (c)(3)(A).

Appendix B

I would also point out that in paragraph (3) of the subpoena provision, it specifically makes reference to identification of the alleged infringer of the material in the notification. And then you look at (c)(1), and we're told exactly what kind of material that is. It's material that resides on the network of the service provider.

And in fact the whole notification procedure in (c) is prefaced with the words to be effective under this subsection. And I don't think there's any way to read all the implicit, contextual, and explicit cross-references to see, to do anything other than tie the subpoena to the take-down notification process. And as has been pointed out, there's no take-[57]down process for (a), a conscious decision by Congress to omit the very predicate that's necessary for the subpoena.

Chief Judge Ginsburg asked a question about notice. There is no requirement in this statute of notice to the individual subscriber, and in other words, the *Eldred* safety valves I think the Court was referring to, fair use, the distinction between ideas and expression, those are not allowed to be asserted by the individual user because the subpoena goes to the service provider, and as we have discussed, the service provider has no control over the material. So how is my client in Rule 45 to mount an effective defense for our subscriber, not just in RIAA cases, but this statute is available to anyone who can claim a copyright. In fact, it's already being used by people much less responsible than RIAA. And my client cannot mount an effective fair use or idea/expression dichotomy defense, because we can't look at the hard drive of a personal

computer, and subsection (m) says that we don't have to and that it's not part of the statute. So I think the statutory [58] scheme makes perfect sense, even the reference to Rule 45, where the service provider has access to the material, and makes no sense when it does not.

There were some questions about Article III and the case or controversy provision. I happen to know, I believe the Supreme Court has said case is broader than controversy, because case includes criminal cases. And in fact, if you look at the Sixth Amendment, there the framers themselves drew a distinction between a criminal case and the compulsory process that a defendant is entitled to to resolve the case. I think it's impossible to argue that an ex parte request for a discovery tool presents a case or controversy to a federal court. It doesn't even ask for —

JUDGE ROBERTS: How is that any different than a search warrant?

MR. MCBRIDE: A search warrant involves another whole authority that, thank the Lord, RIAA doesn't possess, Article II authority. And that is a situation where the executive comes in and is using his authority, and I think that line and one the DOJ agrees with us on, I think, is the line between *Brenson* and *Morton Salt*. And Justice Jackson in [59] *Morton Salt* said, look, courts are not to act as administrative agencies or grand juries. That's not their role. They don't inquire outside of a pending case or controversy. The hard line drawn, picked up by Justice Kennedy in *Catholic Conference* in this very context, a subpoena context. I think that line has to be respected. Under DOJ's view, if this were a case or

controversy, every request for a discovery device in federal court would be its own independent case or controversy, and that can't be right. And in fact *Barwood* says that it's not right. Thank you, Your Honors.

JUDGE GINSBURG: Thank you, Mr. McBride. Thank you all. The case is submitted. The Court will take a brief recess.

(Recess.)

(2)

Supreme Court, U.S.
FILED
AUG 30 2004
OFFICE OF THE CLERK

No. 03-1722

In the Supreme Court of the United States

VERIZON INTERNET SERVICES, INC., PETITIONER

v.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the issuance of a subpoena under 17 U.S.C. 512(h), directing an Internet service provider to identify a user who is allegedly engaging in copyright infringement, violates Article III of the Constitution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Mineta*, 534 U.S. 103 (2001)	9
Ashwander v. *TVA*, 297 U.S. 288 (1936)	10
BMG Music v. *Doe*, No. Civ. A. 04-650, 2004 WL 953888 (E.D. Pa. Apr. 2, 2004)	12
Feist Publ'ns, Inc. v. *Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)	13
Gordon v. *United States*, 69 U.S. (2 Wall.) 561 (1865)	18
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)	18
Hoffman-La Roche Inc. v. *Sperling*, 493 U.S. 165 (1989)	19
Intel Corp. v. *Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004)	18
Muskrat v. *United States*, 219 U.S. 346 (1911)	18
Nashville, Chattanooga & St. Louis Ry. v. *Wallace*, 288 U.S. 249 (1933)	13, 17
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999)	9
Richardson v. *Ramirez*, 418 U.S. 24 (1974)	12
United States Catholic Conference v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988)	19
United States v. *Ferreira*, 54 U.S. (13 How.) 40 (1851)	18
United States v. *Morton Salt Co.*, 338 U.S. 632 (1950)	18

Cases—Continued: Page

Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 9-10
Youakim v. *Miller*, 425 U.S. 231 (1976) 9

Constitution, statutes and rules:

U.S. Const.:
Art. III ..... *passim*
§ 2 12
Amend. I 6, 7, 10-11
Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 90 15
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 19
Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 2
Tit. II, §§ 201-203, 112 Stat. 2877-2886 (17 U.S.C. 512) 2
17 U.S.C. 512 ..... 8, 9
17 U.S.C. 512(a) 2, 5, 7, 8, 9
17 U.S.C. 512(a)-(d) 2
17 U.S.C. 512(b) 2
17 U.S.C. 512(c) 2, 5, 6
17 U.S.C. 512(c)(3)(A) 3, 13
17 U.S.C. 512(d) 2
17 U.S.C. 512(h) ..... *passim*
17 U.S.C. 512(h)(1) 3
17 U.S.C. 512(h)(2)(A) 3, 13
17 U.S.C. 512(h)(2)(B) 3
17 U.S.C. 512(h)(2)(C) 3
17 U.S.C. 512(h)(3) 3
17 U.S.C. 512(h)(4) 4
17 U.S.C. 512(h)(5) 4
17 U.S.C. 512(h)(6) 4, 5
17 U.S.C. 512(k) 6
2 U.S.C. 388 ..... 14, 17

Statutes and rules—Continued: Page

7 U.S.C. 1636b(g) 14
7 U.S.C. 2354(a) 14, 17
7 U.S.C. 2714(a) 14
9 U.S.C. 7 14
12 U.S.C. 2267 14
28 U.S.C. 1782 ..... 14, 18
28 U.S.C. 2351 14
35 U.S.C. 24 ..... 14, 17
42 U.S.C. 7413(b)(2) 14
45 U.S.C. 157(h) 15
47 U.S.C. 401(b) 14
Fed. R. Civ. P.:
Rule 27 ..... 14, 15, 16, 17
Rule 27(a) 7
Rule 27(a)(1) 15
Rule 45 11
Rule 45(c)(2)(B) 5, 14
Rule 45(c)(3) 14
Rule 45(e) 14
Rule 65(b) 17
Fed. R. Crim. P. 41 17

Miscellaneous:

Jesse M. Feder, *Is Betamax Obsolete?*, 37 Creighton L. Rev. 859 (2004) 5
H. R. Conf. Rep. No. 796, 105th Cong., 2d Sess. (1998) 3
H. R. Rep. No. 551, 105th Cong., 2d Sess. Pt. 2 (1998) 2

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (03-1579 Pet. App. 1a-17a) is reported at 351 F.3d 1229. The opinions of the district court (03-1579 Pet. App. 18a-54a, 55a-111a) are reported at 240 F. Supp. 2d 24 and 257 F. Supp. 2d 244.

JURISDICTION

The court of appeals entered its judgment on December 19, 2003. A petition for rehearing was denied on February 24, 2004 (03-1579 Pet. App. 112a-113a). The petition for a writ of certiorari in No. 03-1579 was filed on May 24, 2004. The conditional cross-petition for a writ of certiorari in No. 03-1722 was filed on June 25,

2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860, in order to advance "two important priorities: promoting the continued growth and development of electronic commerce[] and protecting intellectual property rights." H.R. Rep. No. 551, 105th Cong., 2d Sess., Pt. 2, at 23 (1998). Title II of the DMCA addresses the growing use of the Internet to engage in copyright infringement. See Pub. L. No. 105-304, §§ 201-203, 112 Stat. 2877-2886 (17 U.S.C. 512). Title II strikes a balance between the interests of Internet service providers (ISPs), which wish to avoid liability for subscribers' infringing uses of their services, and copyright holders, which wish to protect their intellectual property and minimize online piracy of their works.

a. Title II offers protection to ISPs by creating four statutory safe harbors limiting the potential liability that they would otherwise face under the copyright laws. See 17 U.S.C. 512(a)-(d). Most important for present purposes, Section 512(a) provides that an ISP satisfying certain conditions "shall not be liable * * * for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for" the ISP. Other subsections provide safe harbors to ISPs for caching (or temporarily storing) copyrighted material (17 U.S.C. 512(b)), storing copyrighted material at a user's direction (17 U.S.C. 512(c)), and linking to copyrighted material (17 U.S.C. 512(d)).

b. In exchange for this protection, Title II seeks to supply "strong incentives for [ISPs] and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." H.R. Conf. Rep. No. 796, 105th Cong., 2d Sess. 72 (1998). Most notably, Title II obligates ISPs to assist copyright holders in identifying users who are believed to be engaged in online copyright infringement.

Under Section 512(h), a copyright holder or its representative is authorized to "request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer." 17 U.S.C. 512(h)(1). In order to obtain a subpoena, the requester must file three items. First, the requester must file a notification, in which the requester, *inter alia*, identifies the copyrighted work and the allegedly infringing material; states that it has "a good faith belief" that the use of the copyrighted material is infringing; and avers that the information it is providing is accurate. 17 U.S.C. 512(c)(3)(A) and (h)(2)(A). Second, the requester must file a proposed subpoena, which "authorize[s] and order[s] [the ISP] to expeditiously disclose to the [requester] information sufficient to identify the alleged infringer * * * to the extent such information is available to the [ISP]." 17 U.S.C. 512(h)(2)(B) and (3). Third, the requester must file a sworn declaration stating that "the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights" under the Copyright Act. 17 U.S.C. 512(h)(2)(C).

If the notification satisfies the necessary requirements, the proposed subpoena is in the proper form, and the declaration is properly executed, the clerk must

"expeditiously" issue and sign the proposed subpoena and return it to the requester for delivery to the ISP. 17 U.S.C. 512(h)(4). Upon receipt of the subpoena, the ISP must "expeditiously" disclose to the requester the information required by the subpoena. 17 U.S.C. 512(h)(5). Except as otherwise provided, the issuance of the subpoena and remedies for noncompliance are governed "to the greatest extent practicable" by the provisions of the Federal Rules of Civil Procedure concerning subpoenas. 17 U.S.C. 512(h)(6).

2. The most pervasive form of online copyright infringement today is peer-to-peer (P2P) file sharing. With P2P software programs such as KaZaA, Morpheus, Grokster, and eDonkey, a user can directly identify, access and transfer files residing on another user's computer. The transferred files are not stored, even temporarily, on the computers of the ISPs that provide the users with Internet access; instead, the ISPs' role is merely to serve as "conduits" for the transmission of the files. Although P2P software can be used to exchange any kind of computer file, it is widely used today for the unlawful exchange of copyrighted music (and, increasingly, copyrighted television programs and movies). The phenomenon of online copyright infringement through P2P file sharing has been facilitated by the increased availability of high-speed Internet access (or "broadband"), which allows large files to be transferred in a short period of time. P2P file sharing presents particular challenges to copyright holders seeking to enforce their copyrights, because users engaging in P2P file sharing are effectively anonymous. Although a copyright holder can determine the files shared by a P2P user and the Internet address of a P2P user's computer, it cannot actually identify the P2P user, since that information is known only to the ISP that provides

the user with Internet access. 03-1579 Pet. App. 2a-3a; see generally Jesse M. Feder, *Is Betamax Obsolete?*, 37 Creighton L. Rev. 859, 862-868 (2004) (explaining the technology of P2P file sharing).

3. Petitioner, the principal trade association for the recording industry, has applied for subpoenas nationwide pursuant to Section 512(h) in order to identify individuals who are using P2P file sharing illegally to disseminate copyrighted music. In July 2002 and February 2003, petitioner obtained two subpoenas from the clerk of the United States District Court for the District of Columbia and served them on cross-petitioner, an ISP. The first subpoena sought identifying information about one of cross-petitioner's users, who was sharing more than 600 files, mostly individual songs, using P2P software. Petitioner provided a notification containing the user's Internet address; a list of the files being shared; the time and date that petitioner had downloaded the files; and a statement that the information was being sought in good faith and would be used only to protect the rights of petitioner's members. The second subpoena, like the first, sought identifying information about a user who was sharing hundreds of songs using P2P software. 03-1579 Pet. App. 23a, 55a.

4. a. Cross-petitioner refused to comply with the first subpoena, contending that Section 512(h) authorized a copyright holder to obtain a subpoena only when the ISP was storing copyrighted material at a user's direction under Section 512(c) and not when the ISP was merely serving as a "conduit" for the transmission of copyrighted material under Section 512(a). Petitioner moved to enforce the subpoena pursuant to Section 512(h)(6) and Federal Rule of Civil Procedure 45(c)(2)(B). 03-1579 Pet. App. 22a-24a.

The district court granted the motion to enforce the subpoena. 03-1579 Pet. App. 18a-54a. The court reasoned that the subpoena power under Section 512(h) applied to all "service providers" as that term was defined in Section 512(k), and was not limited to those ISPs entitled to immunity under Section 512(c). *Id.* at 26a. The court noted that Section 512(h) "is written without limitation or restriction as to its application," *id.* at 31a, and added that, "[i]f Congress intended to restrict or limit the [Section 512(h)] subpoena authority based on where the infringing material resides, one would expect to see that limitation spelled out in [that subsection]," *id.* at 31a-32a. A contrary interpretation of Section 512(h), according to the court, would generate collateral litigation on whether infringing material was stored with, or merely transmitted by, an ISP, *id.* at 35a, and thus would "make[] little sense from a policy standpoint," *id.* at 36a. Finally, the court rejected cross-petitioner's contention that copyright holders could simply file suit against an anonymous infringing user and then obtain a third-party subpoena against the ISP, noting that "[t]he additional burden on copyright owners * * * would be considerable." *Id.* at 45a.

b. Cross-petitioner then moved to quash the second subpoena, this time claiming (i) that Section 512(h) violates Article III of the Constitution because it authorizes federal courts to issue binding process in the absence of a pending case or controversy, and (ii) that Section 512(h) violates the First Amendment rights of its users. 03-1579 Pet. App. 56a. The United States intervened to defend the constitutionality of Section 512(h). *Ibid.*

The district court denied the motion to quash the subpoena. Pet. App. 55a-111a. As to cross-petitioner's Article III challenge, the court reasoned that "the

§ 512(h) subpoena authorization does not represent an innovation that is inconsistent with the limited role of the judiciary as it has traditionally been understood in our constitutional regime." *Id.* at 60a. The court noted that "Congress has enacted several provisions that specifically authorize the clerk of the district court to issue subpoenas despite the absence of a pending case or controversy in the federal courts." *Id.* at 64a. Specifically, the court compared Section 512(h) to Federal Rule of Civil Procedure 27(a), a "deeply rooted" provision that authorizes a federal court to require a person to perpetuate testimony by deposition before an action is filed. *Id.* at 66a. Finally, the court noted that "whatever authority is granted under § 512(h) presents neither a danger of encroachment nor some other threat to the institutional integrity and independence of the judiciary." *Id.* at 74a. The court also rejected cross-petitioner's First Amendment challenge, *id.* at 75a-96a, and denied cross-petitioner's motion for a stay of both orders pending appeal, *id.* at 96a-110a.

5. On appeal, cross-petitioner challenged the two orders on the statutory and constitutional grounds advanced below, and the United States again participated for the purpose of defending the constitutionality of Section 512(h). 03-1579 Pet. App. 1a-2a, 6a.

The court of appeals reversed. 03-1579 Pet. App. 1a-17a. Contrary to the district court's conclusion, the court held that Section 512(h) did not authorize a copyright holder to obtain a subpoena when the ISP was merely serving as a "conduit" for the transmission of copyrighted material under Section 512(a). *Id.* at 6a-16a. The court noted that Section 512(h) requires the requester to identify the allegedly infringing material that is to be "removed" or access to which is to be "disabled." *Id.* at 9a. The court reasoned that an ISP

could neither "remove" nor "disable access to" allegedly infringing material where it was serving as a mere "conduit," since the ISP "does not control the content on its subscribers' computers." *Id.* at 10a. The court rejected petitioner's contention that an ISP could "disable access to" allegedly infringing material simply by terminating the user's account, reasoning that other provisions of Section 512 suggested that disabling access and terminating an account were distinct remedies. *Ibid.* Because the court invalidated the subpoenas on statutory grounds, it refused to reach either of cross-petitioner's constitutional arguments. *Id.* at 2a.

ARGUMENT

In No. 03-1579, petitioner contends that this Court should grant review to consider whether 17 U.S.C. 512(h) authorizes a copyright holder to obtain a subpoena when the ISP was serving as a "conduit" for the transmission of copyrighted material under Section 512(a). Cross-petitioner contends that, in the event that the petition in No. 03-1579 is granted, this Court should also grant review to consider whether 17 U.S.C. 512(h) violates Article III of the Constitution. The court of appeals, however, did not pass on the latter question, nor has any other court of appeals addressed it. Moreover, as the district court correctly concluded, cross-petitioner's constitutional challenge lacks merit. Even if the petition in No. 03-1579 is granted, therefore, the conditional cross-petition should be denied.[1]

---

[1] In briefing before the court of appeals, the United States did not address the statutory question presented by petitioner in No. 03-1579. At oral argument and in a supplemental letter, however, counsel for the government informed the panel that the Copyright Office agreed with the district court (and petitioner) that Section

1. a. Because the court of appeals did not reach cross-petitioner's Article III challenge to Section 512(h), it would be inappropriate for this Court to take up that challenge here. Contrary to cross-petitioner's suggestion (Cross-Pet. 29), this Court's ordinary practice is "not [to] decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); accord *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam).

Moreover, this Court's review would be especially inappropriate because the courts of appeals are not divided on the constitutionality of Section 512(h). Indeed, no court of appeals has even addressed the constitutionality of Section 512(h), much less held that Section 512(h) is unconstitutional. The only court, federal or state, that has thus far addressed the constitutionality of Section 512(h) is the district court in this case—and that court rejected cross-petitioner's constitutional challenge. 03-1579 Pet. App. 59a-75a.

This Court has noted that "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of*

512(h) authorizes a copyright owner to obtain a subpoena when the ISP was serving as a "conduit" for the transmission of copyrighted material under Section 512(a). Cross-Pet. App. 33a-34a; 03-1579 Pet. App. 133a-148a. In subsequent litigation, the United States has briefed at length its position that Section 512(h) applies to "conduit" ISPs and that excusing such ISPs from the obligation to identify infringing subscribers would defeat the legislative goals of Section 512, undermine the basic quid pro quo for Section 512's safe harbors, and impede private enforcement of the nation's copyright laws. See U.S. Br. at 16-33, *RIAA* v. *Charter Communications, Inc.*, No. 03-3802 (8th Cir. argued June 14, 2004).

Radiation Survivors, 473 U.S. 305, 319 (1985) (internal quotation marks omitted); accord *Ashwander* v. *TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring). There is no reason for the Court to undertake that task before any court of appeals has even addressed the constitutionality of the statute in question, much less concluded that the statute is unconstitutional.

b. Cross-petitioner advances two arguments as to why the Court should intervene at this early stage to address the constitutionality of Section 512(h). Both arguments lack merit.

First, cross-petitioner contends (Cross-Pet. 28-29) that "a ruling from this Court regarding the presence of statutory authority is meaningless for purposes of final resolution of the validity of RIAA's subpoenas without a decision" on cross-petitioner's Article III challenge, and that "[o]nly this Court can definitively resolve the Article III issue." Should this Court grant certiorari on the petition in No. 03-1579 and affirm the court of appeals on the statutory question presented in that petition, however, it would be unnecessary to address the constitutional issue in this case, or in any other case in which a copyright holder sought to issue a subpoena to a "conduit" ISP. On the other hand, should this Court grant certiorari and reverse the court of appeals on the statutory issue, it does not follow that this Court need resolve the constitutional issue *now*, rather than leaving it for the court of appeals to address in the first instance on remand. Indeed, even if the Court were to grant certiorari on the cross-petition, it would not necessarily provide "final resolution" of the validity of petitioner's subpoenas, as cross-petitioner suggests. If the Court were to hold that Section 512(h) is consistent with Article III, the court of appeals would presumably still have to address cross-petitioner's First Amend-

ment challenge—which the court of appeals also did not reach, see 03-1579 Pet. App. 2a, and which cross-petitioner has not raised in its cross-petition. It is therefore unlikely that granting certiorari on cross-petitioner's Article III challenge would materially advance the resolution of this litigation.

Second, cross-petitioner suggests (Cross-Pet. 29) that this Court should grant the cross-petition to "serve judicial economy and preserve the resources of the federal courts from the thousands and potentially tens of thousands of disputed DMCA subpoena enforcement proceedings that would surely be the result of a new RIAA DMCA subpoena spree." Even if this Court were to hold Section 512(h) unconstitutional, however, it would not alleviate the asserted administrative burden. To the contrary, as cross-petitioner readily concedes (Cross-Pet. 7-9), a copyright holder that was unable to avail itself of the subpoena mechanism created by Section 512(h) could simply file a so-called "John Doe" suit against an anonymous infringing user and then obtain a third-party subpoena against the user's ISP under Federal Rule of Civil Procedure 45, thereby entitling it to receive the same information that a Section 512(h) subpoena would provide. As cross-petitioner notes (Cross-Pet. 9), the recording industry has already filed such suits against more than 3000 anonymous infringing users in courts across the country. Although such lawsuits are less likely to be effective than Section 512(h) subpoenas to the extent that ISPs maintain identifying information only temporarily, see 03-1579 Pet. App. 69a, they unquestionably would impose even *greater* demands on the resources of district courts—especially if, as at least one court has held, a separate complaint must be filed against each one of an ISP's allegedly infringing users, see *BMG*

Music v. *Doe*, No. Civ. A. 04-650, 2004 WL 953888, at *1 (E.D. Pa. Apr. 2, 2004). Granting certiorari on cross-petitioner's Article III challenge, therefore, would not materially affect the overall burden on lower courts from litigation concerning online copyright infringement.

2. In any event, certiorari is not warranted because cross-petitioner's Article III challenge is without merit. Far from a "fundamental departure from constitutional principles and historical practice" (Cross-Pet. 4), Section 512(h) is but one of many statutes and rules that enable federal courts to issue subpoenas and other discovery orders in connection with disputes that are not pending in federal court. Like those other provisions, Section 512(h) is entirely consistent with governing Article III principles.

a. Under Article III of the Constitution, the judicial power of the federal courts extends only to "Cases" and "Controversies." U.S. Const. Art. III, § 2. At the outset, cross-petitioner seemingly concedes (Cross-Pet. 7-9, 15-18) that Article III permits a copyright holder to invoke Section 512(h) when the copyright holder has already filed suit against the alleged infringer, and instead contends only that it does not permit a copyright holder to invoke Section 512(h) in the absence of pending litigation. The existence of a cognizable Article III controversy, however, does not depend on the pendency of a complaint, but rather on the existence of a "dispute[] between adverse parties." *Richardson* v. *Ramirez*, 418 U.S. 24, 36 (1974). The filing of a complaint does not somehow create a controversy under Article III; instead, it is simply a procedural mechanism for bringing an *existing* controversy before the court. Accordingly, this Court has expressly rejected the view that Article III requires that "[a] case or controversy

should be presented by traditional forms of procedure, invoking only traditional remedies." *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U.S. 249, 264 (1933). Instead, as the Court has noted, Article III merely "define[s] and limit[s] judicial power, not the particular method by which that power might be invoked." *Ibid.*

For Article III purposes, therefore, the proper inquiry is whether the procedural requirements of Section 512(h) are sufficient to confine the operation of the subpoena mechanism to disputes in which an actual case or controversy is present. They plainly are. In order to obtain a subpoena under Section 512(h), the requester must file a notification of claimed infringement in which the requester identifies the copyrighted work and the allegedly infringing material; states that it has "a good faith belief" that the use of the copyrighted material is infringing; and avers that the information it is providing is accurate. 17 U.S.C. 512(c)(3)(A) and (h)(2)(A). A party seeking a subpoena under Section 512(h) thus must set forth the functional equivalent of a *prima facie* claim of copyright infringement. See *Feist Publ'ns, Inc.* v. *Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). In such a case, the requester has alleged that there is a genuine case or controversy, arising under federal law, between the copyright holder and the alleged infringer. The existence of that case or controversy empowers the district court to issue a subpoena in aid of the copyright holder's efforts to vindicate its federal rights.[2]

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[2] The foregoing discussion assumes *arguendo* that the issuance of a subpoena under Section 512(h)—a purely ministerial function—involves an exercise of Article III judicial power. The district court identified an alternative ground for rejecting the Article III

b. Contrary to cross-petitioner's suggestion (Cross-Pet. 24-27), Section 512(h) does not represent a novel grant of authority to the federal courts. Numerous other statutes and rules provide for the issuance of judicial process by an Article III court even in the absence of an underlying action. See, *e.g.*, Fed. R. Civ. P. 27 (order compelling deposition "to perpetuate testimony regarding any matter that may be cognizable" in a federal court); 2 U.S.C. 388 (subpoena for contested election before House of Representatives); 7 U.S.C. 2354(a) (subpoena for administrative claims before Plant Variety Protection Office); 9 U.S.C. 7 (judicially enforceable summons for arbitration proceedings under Federal Arbitration Act); 28 U.S.C. 1782 (order compelling testimony and document production for use in proceeding before foreign tribunal); 35 U.S.C. 24

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challenge, concluding that the mere issuance of a subpoena under Section 512(h) does not involve the exercise of Article III judicial power at all (and therefore does not implicate Article III's case-or-controversy requirement). See 03-1579 Pet. App. 61a-64a. To be sure, traditional subpoenas are ordinarily regarded as judicial orders (even if issued, as here, without direct judicial involvement), and failure to comply with such subpoenas "without adequate excuse" may be deemed contempt of court. Fed. R. Civ. P. 45(e). The compulsory character of a subpoena, however, is more nominal than real: the recipient may object to the subpoena, in which case "the party serving the subpoena shall not be entitled to inspect and copy the materials [being sought] * * * except pursuant to an order of the court by which the subpoena was issued," Fed. R. Civ. P. 45(c)(2)(B), or move to quash or modify the subpoena, Fed. R. Civ. P. 45(c)(3). Thus, it is not readily apparent that the judicial *enforceability* of a subpoena renders its mere *issuance* the exercise of judicial power, any more than the issuance of a judicially enforceable administrative order by an executive agency constitutes the exercise of such power. See, *e.g.*, 7 U.S.C. 1636b(g), 2714(a); 12 U.S.C. 2267; 28 U.S.C. 2351; 42 U.S.C. 7413(b)(2); 47 U.S.C. 401(b).

(subpoena for administrative claims before Patent and Trademark Office); 45 U.S.C. 157(h) (subpoena for arbitration proceedings under the Railway Labor Act). Those provisions cannot meaningfully be distinguished from Section 512(h).

i. Most notably, Federal Rule of Civil Procedure 27 authorizes district courts to issue orders compelling depositions in order to "perpetuate testimony regarding any matter that may be cognizable in" federal court, but that the petitioning party "is presently unable to bring * * * or cause * * * to be brought." Fed. R. Civ. P. 27(a)(1). Like Section 512(h), therefore, Rule 27 permits a federal court to compel the giving of testimony with respect to disputes that "may be cognizable" in federal court, but that are not yet (and may never be) the subject of pending federal litigation. Rule 27 is the latest version of a provision that dates from the Judiciary Act of 1789. See Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 90 (providing that a federal circuit court "may, according to the usages in chancery[,] direct" the taking of depositions *in perpetuam rei memoriam* "if they relate to matters that may be cognizable in any court of the United States").

Cross-petitioner concedes that Rule 27 is consistent with Article III, but insists that Section 512(h) may be distinguished from Rule 27 on four grounds. None of cross-petitioner's contentions is availing.

First, cross-petitioner asserts (Cross-Pet. 25) that a party seeking to preserve testimony under Rule 27 "must state under oath an unequivocal intention to bring a lawsuit in federal court." To the contrary, Rule 27 requires a party to assert only that it "expects to be a party to an action cognizable in" federal court, but "is presently unable to bring it or cause it to be brought." Rule 27 therefore does not require a party to provide

any assurance that a lawsuit will in fact be filed. Moreover, Rule 27 applies not only to potential plaintiffs, but also to potential defendants, who obviously have no control over the filing of any lawsuit. Just as it is entirely possible that no federal lawsuit will be filed when a party seeks to preserve testimony under Rule 27, so too is it entirely possible that no lawsuit will ultimately be filed when a requester seeks a subpoena under Section 512(h) (if, for instance, the requester merely warns the would-be defendant about his conduct upon learning his identity, or settles with him before a complaint is filed). In each case, the mere possibility that the underlying dispute will be resolved without further litigation does not render the dispute any less of a case or controversy for Article III purposes.

Second, cross-petitioner contends (Cross-Pet. 25-26) that "Rule 27 is not a discovery tool" and that "it authorizes the perpetuation of known evidence in the face of an averment as to its imminent loss." To the extent that Section 512(h) is designed to discover new information rather than to preserve previously known information, cross-petitioner does not explain why this distinction is of constitutional import. In any event, Section 512(h) is not readily distinguishable from Rule 27 in this respect, because one of the primary purposes of Section 512(h) is to preserve evidence that, while not yet known to the requester, may be lost if judicial action is not taken. See 03-1579 Pet. App. 69a.

Third, cross-petitioner suggests (Cross-Pet. 26) that Rule 27 "requires notice to the potential adverse party" before any judicial process issues, whereas Section 512(h) "does not require any notice to the real party in interest (the anonymous subscriber)." Nothing in Article III, however, establishes adversarial proceedings as a prerequisite to judicial action. Federal courts

have the unquestioned authority to issue search warrants and temporary restraining orders—vastly more substantial exercises of judicial power than the issuance of a subpoena—on an *ex parte* basis. See Fed. R. Crim. P. 41; Fed. R. Civ. P. 65(b).

Fourth, cross-petitioner argues (Cross-Pet. 27) that "a suit to perpetuate testimony has roots in equity that predate the Constitution itself." This Court, however, has long rejected the argument that only those procedural mechanisms that were available at the time of the Framing are consistent with Article III. See, *e.g.*, *Nashville, Chattanooga & St. Louis Ry.*, 288 U.S. at 264. Because Section 512(h) requires some showing of a genuine underlying case or controversy that arises under federal law, it is indistinguishable from Rule 27 for Article III purposes, notwithstanding the fact that it is of more recent vintage.

ii. Cross-petitioner attempts to distinguish some of the numerous other federal laws that authorize the issuance of judicial process even in the absence of an underlying action. Those contentions likewise lack merit. With regard to 2 U.S.C. 388, which requires "a judge or clerk of the United States district court" to issue subpoenas for election contests before the House of Representatives, cross-petitioner notes (Cross-Pet. 24) that those subpoenas are not enforceable by Article III courts. Cross-petitioner does not explain, however, why the unenforceability of judicial process would render a statute *less* problematic under Article III. With regard to 7 U.S.C. 2354(a) and 35 U.S.C. 24, which require district court clerks to issue subpoenas for claims in administrative proceedings, cross-petitioner contends (Cross-Pet. 24) that those provisions "involve an underlying case or controversy * * * pending before a federal agency." But cross-petitioner thereby

concedes that a dispute arising under federal law need not be pending in an Article III *court* for that court to issue valid process. Finally, cross-petitioner says nothing at all about 28 U.S.C. 1782, a much broader discovery provision that dates back nearly 150 years. As this Court noted last Term in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004), that provision authorizes discovery for use in a foreign proceeding even if that proceeding is not "pending" or "imminent," but is merely "within reasonable contemplation." *Id.* at 2479-2480. If Article III permits a federal court to issue discovery orders even when a complaint is not yet pending before a *foreign* tribunal, it surely authorizes a federal court to issue a more limited kind of discovery order when the requester makes a *prima facie* showing that it could commence litigation in that very court.

c. Cross-petitioner cites (Cross-Pet. 15) a number of decisions from this Court for the proposition that federal courts cannot issue judicial process absent an underlying lawsuit. All of those decisions are inapposite.

In a series of decisions, this Court has invalidated statutes that required federal courts to issue advisory opinions. See *Muskrat* v. *United States*, 219 U.S. 346 (1911); *Gordon* v. *United States*, 69 U.S. (2 Wall.) 561 (1865); *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The venerable rule against advisory opinions, however, has no bearing on the constitutionality of Section 512(h). Unlike the issuance of advisory opinions, the issuance of subpoenas has long been a routine responsibility of federal courts, and can fairly be characterized as a duty "of a judicial nature." *Id.* at 411.

In *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), the Court, in the course of sustaining the

enforceability of an administrative subpoena, suggested that a federal court, unlike an administrative agency, may not engage in a "'fishing expedition' to see if it can turn up evidence of guilt." *Id.* at 641-642. Section 512(h) presents no such difficulties, because a copyright holder must have "evidence of guilt" before it can apply for a Section 512(h) subpoena. Far from unearthing violations of the copyright laws, a section 512(h) subpoena serves simply to identify the persons responsible for violations already alleged to have occurred.

In *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), the Court held that, if a federal court lacks subject matter jurisdiction over the underlying complaint, a subpoena issued pursuant to an assertion of jurisdiction may be challenged as void. *Id.* at 80. Where a court is issuing a subpoena under Section 512(h), however, it is unquestionable that the court would have subject matter jurisdiction over the underlying claim of copyright infringement. Nothing in *United States Catholic Conference* suggests that Article III disables Congress from authorizing the issuance of subpoenas in that circumstance simply because the subpoena is issued before the complaint is actually filed.

Finally, in *Hoffman-La Roche Inc.* v. *Sperling*, 493 U.S. 165 (1989), the Court held that federal district courts have discretionary authority to facilitate notice to potential plaintiffs in suits brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* 493 U.S. at 169-170. The Court did not address any Article III issue in its opinion, but instead merely cautioned against judicial participation in the "solicitation of claims," out of concern for "respect[ing] judicial neutrality." *Id.* at 174. No such concern about the judicial solicitation of claims is

implicated by the issuance of a subpoena under Section 512(h), which serves merely to assist the requester in identifying a potential defendant who could otherwise be sued anonymously.

3. Both of the issues presented by the petition and conditional cross-petition are raised in a case currently pending before the Eighth Circuit. See *RIAA* v. *Charter Communications, Inc.*, No. 03-3802 (argued June 14, 2004). As noted above, see p. 8 note 1, *supra*, the United States has intervened in that case and has filed a brief defending the constitutionality of Section 512(h) and supporting petitioner's interpretation of the scope of that section. If the Eighth Circuit agrees with the United States that Section 512(h) authorizes a copyright holder to obtain a subpoena when an ISP was merely serving as a "conduit" for the transmission of copyrighted material under Section 512(a), the Eighth Circuit will have to reach the constitutional issue presented by the cross-petition. Should the Eighth Circuit hold that Section 512(h) violates Article III, such a decision would provide this Court with a more suitable vehicle than this case in which to consider the constitutional issue. Moreover, in the event that the Court declines to grant the petition in this case, the Eighth Circuit's decision will also present a further opportunity for this Court to consider the full range of issues presented by the petition and the conditional cross-petition. Even if the Article III challenge advanced by cross-petitioner were otherwise appropriate for this Court's review, therefore, the cross-petition should be denied.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2004

(3)

Supreme Court U.S.
FILED
AUG 30 2004
OFFICE OF THE CLERK

No. 03-1722

IN THE

Supreme Court of the United States

VERIZON INTERNET SERVICES, INC.,
Cross-Petitioner,

v.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
Cross-Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONSE TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether Congress may authorize federal district court clerks to perform the ministerial task of issuing a subpoena for the identity of an alleged copyright infringer, based on the presentation of documentation that indicates a sufficient basis for an infringement action.

PARTIES TO THE PROCEEDING

Petitioner Recording Industry Association of America, Inc. was the appellee below. Verizon Internet Services, Inc. was the appellant. The United States intervened to defend the constitutionality of the Digital Millennium Copyright Act.

RULE 29.6 DISCLOSURE

Petitioner is a not-for-profit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

ARGUMENT 4

I. SECTION 512(h) DOES NOT VIOLATE ARTICLE III. 4

A. Congress Has the Power To Authorize Discovery Prior to the Filing of a Complaint. 4

B. The Ministerial Act of Issuing a Subpoena Is Not an Exercise of the Judicial Power. 8

C. The Right to Information Established in § 512(h) Itself Supplies a Case or Controversy 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937) .8, 17

Brown v. McDonald, 133 F. 897 (3d Cir. 1905) 7

Central Loan & Trust Co. v. Campbell Commission Co., 173 U.S. 84 (1899) 13

Custiss v. Georgetown & Alexandria Turnpike Co., 10 U.S. (6 Cranch) 233 (1810).....13

De Wagenknecht v. Stinnes, 250 F.2d 414 (D.C Cir. 1957).....5

Elliott v. Peirsol's Lessee, 26 U.S. (1 Pet.) 328 (1828) 13

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990).....14

Fidelity National Bank & Trust Co. v. Swope, 274 U.S. 123 (1927) 17

Fong Yue Ting v. United States, 149 U.S. 698 (1893) 17

Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792) 13

Heathcoote v. Fleete, 2 Vern. 442, 23 Eng. Rep. 883 (Ch. 1703).....8

Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165 (1989) 11

ICC v. Brimson, 154 U.S. 447 (1894) 9, 10, 13, 14, 17

Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 2466 (2004) 11

Lewis v. NLRB, 357 U.S. 10 (1958).....14

Lo Duca v. United States, 93 F.3d 1100 (2d Cir. 1996) 13

Mistretta v. United States, 488 U.S. 361 (1989) 13, 14, 15

Morrison v. Olson, 487 U.S. 654 (1988).....13, 14

Nashville, Chattanooga & St. Louis Railway v. Wallace, 288 U.S. 249 (1933) 8, 16, 17

Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824) 16

Ex parte Siebold, 100 U.S. 371 (1879) 14

In re Summers, 325 U.S. 561 (1945) 17

Tutun v. United States, 270 U.S. 568 (1926) 17

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) 11

United States v. Ferreira, 54 U.S. (13 How.) 40 (1851) 13, 14

United States v. Morton Salt Co., 338 U.S. 632 (1950) 11, 12

United States v. Nobles, 422 U.S. 225 (1975) 1

United States v. Turner, 933 F.2d 240 (4th Cir. 1991) 13

Venn v. St. Paul Fire & Marine Insurance Co., 99 F.3d 1058 (11th Cir. 1996) 13

Ex parte Virginia, 100 U.S. 339 (1879) 13

Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) 1

STATUTES AND RULES

5 U.S.C. § 552(a) 15

7 U.S.C. § 2354(a) 10, 11

9 U.S.C. § 7 10

17 U.S.C. § 512(c)(3)(A) 5

17 U.S.C. § 512(h) ..... *passim*

28 U.S.C. § 1782 11

28 U.S.C. § 332(d)(1) 10

29 U.S.C. § 161(1) 10
29 U.S.C. § 657(b) 10
29 U.S.C. § 1132(c)(1) 15
35 U.S.C. § 24 ..... 10, 11
45 U.S.C. § 157(h) 10, 11
1 Stat. 88 6
18 Rev. Stat. § 866 (1878) 7
Fed. R. Civ. P. 27 ..... *passim*
Fed. R. Civ. P. 45 15
Fed. R. Civ. P. 65(b) 7

LEGISLATIVE MATERIALS

S. Rep. No. 105-190 (1998) 14

MISCELLANEOUS

2 Joseph Story, *Equity Jurisprudence* § 1483 (13th ed. 1886) 7

BRIEF IN RESPONSE

The Recording Industry Association of America ("RIAA") respectfully submits this Brief in Response to Verizon Internet Services, Inc.'s ("Verizon's") Conditional Cross-Petition.

It is unclear why Verizon has filed a conditional cross-petition seeking review of its Article III challenge to § 512(h) of the Digital Millennium Copyright Act ("DMCA"). Verizon does not seek to alter or modify the judgment of the D.C. Circuit in any respect, and Verizon's constitutional arguments (if successful) would not expand the relief it would receive in this case. Moreover, as Verizon notes, it raised the Article III issue in the D.C. Circuit. Cross-Pet. at 14. Verizon would therefore be free to raise the issue in this Court as an alternative ground for affirmance in the event certiorari were granted on RIAA's petition. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

As will be shown, Verizon's Article III challenge to § 512(h) lacks any merit, and therefore is not, standing alone, "of sufficient general importance to justify [a] grant of certiorari." *United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975). Nevertheless, because both RIAA's interests and those of the public would be served by a conclusive resolution of all of Verizon's potential objections to § 512(h), and because Verizon could raise the issue as an alternative ground for affirmance if RIAA's petition is granted, RIAA has no objection to this Court considering the Article III issue in conjunction with the question presented in RIAA's petition.

STATEMENT OF THE CASE

Much of the history of this case is set forth in RIAA's Petition for Writ of Certiorari. In this statement, RIAA provides limited additional detail concerning litigation on the Article III issue raised by the conditional cross-petition.

The Clerk of the District Court for the District of Columbia issued the first of the two DMCA subpoenas at issue in this case on July 24, 2002. At that time, Verizon objected to the subpoena, arguing that § 512(h) does not authorize issuance of subpoenas to Internet service providers ("ISPs") that merely transmit infringing material. Verizon did not raise any Article III objections to the subpoena.

RIAA moved to compel compliance with the subpoena. In response, Verizon made its statutory argument and suggested in passing that § 512(h) might raise Article III concerns. At oral argument, however, Verizon disclaimed any contention that § 512(h) violated Article III. Pet. App. 49a ("Verizon, however, does not assert that the subpoena power in subsection (h), as applied to service providers (like Verizon) under subsection (a), is unconstitutional."). The district court rejected Verizon's statutory arguments and did not decide the Article III issue (which was not before it). Pet. App. 49a & n.17.

RIAA issued a second subpoena to Verizon on February 3, 2003, to identify a second Internet infringer. This time Verizon moved to quash the subpoena, and argued for the first time that the DMCA violated both Article III and the First Amendment. The United States intervened to defend the constitutionality of the statute.

After briefing and argument, the district court rejected Verizon's constitutional challenges. In particular, the court rejected Verizon's Article III challenge, holding that the issuance of a subpoena by a district court clerk is a

"quintessentially ministerial duty" that does not implicate the Judicial Power, Pet. App. 61a:

> [T]he fact that Congress has directed an employee of the judicial branch to carry out a specific non-discretionary function neither implicates Article III judicial power nor involves federal judges in an investigation of the sort properly relegated to one of the other branches. In a real-world sense, no Article III judge takes any action with respect to a § 512(h) subpoena until the copyright holder moves to enforce the subpoena or the service provider moves to quash it – at which time there is a concrete controversy sufficient to confer jurisdiction under Article III of the Constitution.

Pet. App. 63a.

The district court catalogued a host of analogous federal provisions, focusing particularly on Federal Rule of Civil Procedure 27, which it found to be a "close parallel" to § 512(h) and indistinguishable for purposes of Article III. Pet App. 74a, 64a-70a. In Rule 27, the court found "a compelling precedent for judicial compulsion of information outside the context of a pending case or controversy," Pet. App. 70a, and the court specifically noted that a § 512(h) subpoena request must meet requirements similarly rigorous to those required for obtaining a Rule 27 deposition, Pet. App. 67a. The district court directed Verizon to comply with the subpoena and denied Verizon a stay pending appeal, finding no "substantial likelihood that Verizon will prevail on the merits of its Article III challenge." Pet. App. 100a.

The D.C. Circuit reversed the district court on statutory grounds and did not reach the Article III issue. The court of appeals, however, held that there was Article III jurisdiction to review the orders in question. Pet. App. 2a n.1.

ARGUMENT

I. SECTION 512(h) DOES NOT VIOLATE ARTICLE III.

A. Congress Has the Power To Authorize Discovery Prior to the Filing of a Complaint.

1. Even if the issuance of a subpoena by a court clerk involves an exercise of the Judicial Power, § 512(h) is constitutional. As the United States noted in defending the statute in the court of appeals, "[t]he central fallacy of [Verizon's] argument is that it confuses the *existence of an Article III controversy* with the *pendency of a complaint*." Brief of the United States, No. 03-7015, at 9 (D.C. Cir. filed July 16, 2003) (emphasis in original). Here a concrete case or controversy exists between the copyright owner and the copyright infringer that cannot be adjudicated absent disclosure of the infringer's identity. Where such a controversy exists, Article III poses no bar to pre-litigation discovery mechanisms, such as those that have been enshrined in federal law since the Judiciary Act of 1789. All that is required is the existence of a controversy cognizable in federal court, not the existence of a pending case.

In this respect, § 512(h) subpoenas are indistinguishable on any relevant ground from the discovery permitted under Federal Rule of Civil Procedure 27, which is the modern version of a pre-litigation discovery provision that Congress first established in 1789 and that has a far older pedigree. Under Rule 27, a person who wishes to preserve testimony "regarding any matter that may be cognizable in any court of the United States" may seek discovery, before any complaint has been filed, in order to preserve evidence for potential future litigation.

Section 512(h) and Rule 27 function almost identically. Like a § 512(h) subpoena, Rule 27 provides a means of obtaining discovery prior to the filing of a complaint. And like a party obtaining a § 512(h) subpoena, a person seeking

discovery under Rule 27 may proceed without actually filing a complaint at the time the process is invoked or at any point thereafter. In the district court's words, "under both Rule 27(a) and § 512(h), private parties may avail themselves of judicial machinery to obtain information prior to the filing of a complaint—but only if they satisfy a specific set of criteria and identify with particularity the information they seek to compel." Pet. App. 68a.

If there is any functional difference between Rule 27 and § 512(h), it is that § 512(h) maintains a closer connection to the case or controversy that supports its use. Under Rule 27, a court may order discovery as long as there is "a sufficient likelihood that the expected litigation will eventuate," a requirement that may be met even if the proposed litigation is contingent on the passage of administrative action or on legislation that would create a cause of action. *De Wagenknecht v. Stinnes*, 250 F.2d 414, 416-17 (D.C. Cir. 1957). In contrast, a § 512(h) subpoena may issue not on a mere showing that a proposed claim "may be cognizable" in federal court, Fed. R. Civ. P. 27(a)(1), but only to protect the particular rights identified in Title 17 of the U.S. Code, 17 U.S.C. § 512(h)(2)(C). Unlike discovery under Rule 27, which contains no limits on when the preservation of testimony may be sought, a DMCA subpoena cannot issue until the claim at issue is ripe, that is, until after the infringement has occurred. And in seeking a § 512(h) subpoena, a party must attest to all the elements of a copyright claim: ownership of, or license to, a particular copyright; and a violation of its exclusive rights. 17 U.S.C. § 512(h)(2)(A) (requiring presentation of a notice like that described in § 512(c)(3)(A)). If Rule 27 discovery is sufficiently connected to the underlying case or controversy that supports it, as Verizon concedes, then a § 512(h) subpoena satisfies Article III *a fortiori*.

Similarly, to whatever extent the DMCA subpoena invokes the Judicial Power at all, it invokes that power to a much lesser extent than does Rule 27. Under Rule 27, a party may seek a broad range of discovery, including oral examination, the production of documents, an inspection of land, and even mental and physical examinations. Fed. R. Civ. P. 27(a)(3). In contrast, under § 512(h), copyright holders can use only one discovery device and can obtain only limited information to identify defendants against whom to bring suit.

2. Verizon identifies distinctions between Rule 27 and § 512(h) that it claims are dispositive. Some of these are not even distinctions; none of them is relevant to Article III.

First, Verizon contends that Rule 27 requires "an unequivocal intention to bring a lawsuit in federal court," whereas § 512(h) does not. That is incorrect. In fact, Rule 27 requires only that the petitioner "expects" to be a party. But because a Rule 27 petitioner may be a potential defendant, whether a lawsuit follows the Rule 27 deposition may very well be out of the petitioner's control. Moreover, as explained *supra*, the expectation of potential litigation need not evolve into actual litigation. Under prior versions of Rule 27, including that contained within the First Congress's Judiciary Act of 1789, there was no requirement that the petitioner even expect to become a party. 1 Stat. 88, 90. The DMCA subpoena, in contrast, requires an actual allegation of copyright infringement, and is thus more closely tied to a case or controversy.

Second, Verizon suggests Rule 27 may be used only to preserve testimony, whereas DMCA subpoenas are "discovery." This is both wrong and irrelevant. It is wrong because DMCA subpoenas are critical to the preservation of evidence. ISPs maintain IP (Internet Protocol) address logs for only a limited period of time, and § 512(h) allows

copyright owners to preserve evidence identifying potential defendants before that evidence is destroyed, thus performing the same role that Rule 27 performs. Pet. App. 69a. In any event, Verizon offers no reason to believe that obtaining discovery to identify possible defendants is less permissible under Article III than preserving evidence.

Third, Verizon notes that a Rule 27 petition is not heard *ex parte*, whereas § 512(h) permits a copyright owner to obtain a subpoena without an adversary proceeding. Cross-Pet. at 26. As an initial matter, Verizon's characterization of the clerk's duty as a "hearing" does not conform with reality; the clerk is merely performing a ministerial duty. In any case, however, Verizon cannot explain why Article III is violated by the lack of an adversarial proceeding. Clerks routinely issue summonses and subpoenas without adversaries present. And federal courts may hear requests for temporary restraining orders on an *ex parte* basis under Rule 65(b).

Fourth, Verizon contends that Rule 27 is exceptional because its "roots in equity . . . predate the Constitution." Cross-Pet. at 27. Far from distinguishing the DMCA subpoena provision, this argument demonstrates that § 512(h) is just another form of a long-accepted mechanism for pre-complaint discovery. A § 512(h) subpoena is thus not some unprecedented effort "to discover facts unconnected to any case or controversy," as Verizon contends, Cross-Pet. at 27, but Congress's most recent recognition of "the right to file a bill of discovery to ascertain the proper persons to make defendants in a proposed suit at law." *Brown v. McDonald*, 133 F. 897, 898 (3d Cir. 1905); *see* 2 Joseph Story, *Equity Jurisprudence* § 1483, at 811 (13th ed. 1886); 18 Rev. Stat. § 866 (1878) (continuing the practice in

chancery of allowing certain pre-litigation depositions relating to matters cognizable in federal court).[1]

At bottom, § 512(h) is nothing more than another device for achieving what courts have accomplished for centuries through similar means. In emphasizing that Article III is concerned "not with form, but with substance," this Court has reasoned that "[t]he judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked." *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933). Accordingly, when Congress provides an alternative means of accomplishing what Verizon recognizes has been achievable since 1630 by the "John Doe" lawsuit, Cross-Pet. at 7-9, and the alternative means themselves have firmly-planted historical roots, there is no basis for claiming that Congress has violated Article III. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) ("Congress is not confined to traditional forms or traditional remedies.").

B. The Ministerial Act of Issuing a Subpoena Is Not an Exercise of the Judicial Power.

1. Even if the foregoing considerations were not dispositive, § 512(h) would raise no Article III problem. It is well established that Congress has the power to authorize the issuance of a subpoena backed by the enforcement authority of the federal courts even if the subpoena does not seek evidence for use in a cognizable "case or controversy." Indeed, it has been the law for more than a century that Congress may authorize subpoenas in the exercise of its

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[1] Equitable bills of discovery to learn the identities of potential defendants (as distinct from bills to preserve testimony) date back at least 300 years. *See, e.g., Heathcoote v. Fleete*, 2 Vern. 442, 23 Eng. Rep. 883 (Ch. 1702) (permitting discovery prior to filing a lawsuit in order to ascertain the name of a wharf owner alleged to be negligent). There is no basis for concluding that the Framers intended to discontinue this longstanding equitable practice.

Article I powers, and that Article III courts can enforce such subpoenas independent of a pending judicial proceeding.

That is the precise holding of *ICC v. Brimson*, 154 U.S. 447 (1894). In *Brimson*, rejecting the claim Verizon advances here, the Court held that Congress has Article I authority to provide for the issuance of subpoenas backed by judicial enforcement even if the subpoenas do not seek evidence for a judicial proceeding, and that Article III courts act within their "case or controversy" authority in adjudicating disputes over such subpoenas. *Id.* at 478, 485.

In *Brimson*, the Interstate Commerce Commission had issued subpoenas to parties as part of an investigation it was conducting under authority delegated by Congress. When the parties refused to comply with the subpoenas, the ICC sought enforcement in federal court, as the statute provided. The Court rejected the subpoenaed parties' argument that such subpoenas are "judicial" in nature and cannot be authorized outside of a pending judicial proceeding, and thus that the Interstate Commerce Act violated Article III by "authoriz[ing] the circuit courts of the United States to use their process in aid of inquiries before the [ICC]" in the absence of a pending case or controversy. *Id.* at 468. The Court reasoned that "[w]ithout the aid of judicial process of some kind," Congress's substantive regulatory efforts would lack a means of meaningful enforcement. *Id.* at 485. Accordingly, the Court found it "clear and indisputable" that Congress had the power to authorize the issuance of judicially-backed subpoenas outside the context of a pending judicial proceeding. *Id.* at 476.[2]

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[2] The Court's decision in *Brimson* also makes clear that what Verizon terms "bizarre consequences," Cross-Pet. at 22, are in fact quite permissible. Verizon complains that judicial review or enforcement of subpoenas issued by a court clerk would be problematic. But *Brimson* itself found no problem with judicial enforcement of subpoenas issued by

Brimson makes clear that the mere issuance of a subpoena is not an exercise of judicial power. This reflects the commonsense notion that, when attorneys in a civil case issue subpoenas, as the Federal Rules permit them to do, or executive officials issue subpoenas to investigate possible violations of federal law, they are not exercising Article III authority.

Verizon's makeshift Article III argument would require the invalidation of a host of other statutes in which Congress has authorized subpoenas outside the context of pending or anticipated litigation. Such subpoenas are authorized by various patent laws, 35 U.S.C. § 24 (authorizing, since 1870, issuance of subpoenas for evidence in patent interference proceedings); 7 U.S.C. § 2354(a) (enacted in 1970 and providing for same procedure); the Railway Labor Act, 45 U.S.C. § 157(h) (authorizing, as of 1926, clerks to issue subpoenas at request of private party arbitrators); and the law establishing Judicial Councils for investigating allegations of judicial misconduct, 28 U.S.C. § 332(d)(1) (authorizing, as of 1990, issuance of subpoenas by clerk and enforcement by contempt). Congress has also authorized the issuance of judicially-backed subpoenas by administrative agencies such as OSHA, 29 U.S.C. § 657(b), and the NLRB, 29 U.S.C. § 161(1), and even by private parties, *e.g.*, 9 U.S.C. § 7 (authorizing private arbitrators to issue judicially enforceable subpoenas).[3]

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an entity other than an Article III judge: If there is any doubt whether a case or controversy exists at the time of issuance—and although none is necessary, such a case or controversy undoubtedly exists, *supra* Part I.A; *infra* Part I.C.—no such doubt can remain once there is a dispute over enforcement. By that time, the disputes "are so presented that the judicial power is capable of acting on them finally as between the parties before the court." *Brimson*, 154 U.S. at 478.

[3] Verizon attempts to distinguish a few of these statutes on the grounds that the statutes authorize subpoenas in the context either of a dispute

None of these statutes involve litigation pending before an Article III court at the time the subpoena is issued. All are at risk under Verizon's argument. Clearly, the issuance of judicially enforceable subpoenas outside a case or controversy is a long-accepted practice that is consistent with Article III.

Indeed, this Court recently concluded in *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004), that 28 U.S.C. § 1782 permits federal courts to issue subpoenas authorizing discovery at the behest of private parties in foreign tribunals, even when no action is yet pending in the foreign tribunal. In many instances in which § 1782 is invoked, there will be no controversy that can ever be cognizable in federal court. Yet the Court had no difficulty concluding that Congress authorized discovery in aid of the resolution of such proceedings. It is inconceivable that this Court could have rendered such a ruling if Verizon's theory of Article III had any merit.

2. The Article III decisions Verizon cites show only that the power to issue a judicially enforceable subpoena depends on a valid grant of authority from Congress. *E.g.*, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) (refusing to permit enforcement of subpoena, because the court lacked jurisdiction over the underlying suit, and there was no other source of authority); *see also Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170-71 (1989) (permitting district court to facilitate notice to potential plaintiffs because statute demonstrated Congress's goal of collective lawsuits). Indeed, *United States v. Morton Salt Co.*, 338 U.S. 632 (1950),

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pending before a federal agency, 35 U.S.C. § 24; 7 U.S.C. § 2354(a), or of a private arbitration that may result in an *award* enforceable in federal court, 45 U.S.C. § 157(h). But in neither situation is there an actual case or controversy pending (or anticipated) before an Article III tribunal in the sense Verizon argues is required.

makes this point explicitly. The Court there faced the question whether the Federal Trade Commission could issue certain subpoenas without interfering with the courts' prerogative. Having determined that such an agency action did not interfere with any *inherent* power of the courts, *id.* at 641-42, the Court turned to the question of where *Congress* had placed the subpoena power: The Federal Trade Commission Act shows that "Congress obviously deemed it a function of the Commission, rather than of the courts." *Id.* at 643. *Morton Salt* turned not on whether Article III permits courts to issue subpoenas absent a case or controversy, but on where Congress had placed that power, *id.* *Morton Salt* gives no support to the suggestion that Article III *bars* Congress from placing that authority in the courts or a court clerk; to the contrary, its discussion suggests that Congress may do so if it wishes.

Here, of course, Congress has specifically authorized the issuance of subpoenas prior to the filing of a complaint in federal court. Section 512(h) thus is a permissible exercise of Congress's authority under Article I, and does not in any way invade the province of the Judiciary.

3. With Congress's power to authorize judicially-enforceable subpoenas outside a pending case or controversy well-established, the only remaining question is whether the ministerial task of issuing such subpoenas may be assigned to a federal court clerk.[4] This Court has consistently held, however, that Article III actors (even judges) may be delegated a host of non-judicial functions, so long as the delegation neither aggrandizes the authority of

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[4] Verizon is wrong to suggest that RIAA waived the argument that issuance of a subpoena is a ministerial task. Cross-Pet. at 18. To the contrary, RIAA explicitly argued, "[A]s the district court recognized and Congress made clear, issuance of a DMCA subpoena is a 'ministerial' task that requires no exercise of discretion." Brief of Appellee RIAA, No. 03-7015, at 25 (D.C. Cir. filed July 10, 2003).

the judiciary nor interferes with its operation. *See Morrison v. Olson*, 487 U.S. 654, 681 n.20 (1988). Congress can delegate tasks such as overseeing the independent counsel process, *see id.*, serving on the sentencing commission, *see Mistretta v. United States*, 488 U.S. 361 (1989), or conducting extradition proceedings, *see Lo Duca v. United States*, 93 F.3d 1100 (2d Cir. 1996). Indeed, the statute at issue in *Brimson* authorized judges or clerks to preside over depositions conducted pursuant to the ICC's subpoena authority. *See Brimson*, 154 U.S. at 462.

Moreover, the Court has held repeatedly that the performance of ministerial functions by clerks of the Court does not constitute the exercise of Judicial Power. *E.g.*, *Custiss v. Georgetown & Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) 233 (1810); *Elliott v. Peirsol's Lessee*, 26 U.S. (1 Pet.) 328 (1828); *Ex parte Virginia*, 100 U.S. 339 (1879); *Central Loan & Trust Co. v. Campbell Comm'n Co.*, 173 U.S. 84 (1899). Thus, clerks have long performed a wide variety of ministerial tasks Congress delegated to them, including such things as recordation of inquisitions, deeds, and other legal documents, *see Custiss*, issuance of summons and arrest warrants, *see United States v. Turner*, 933 F.2d 240 (4th Cir. 1991), computation of interest, *see Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058 (11th Cir. 1996), and other non-discretionary functions. *See generally Ex parte Virginia*, 100 U.S. 339 (1879) (discussing distinction between judicial acts and ministerial functions). All of these acts have legal consequences, but none are an exercise of the Judicial Power.[5]

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[5] Verizon relies on *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792) and *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851), but those cases affirm Congress's power to delegate non-judicial functions to judges. *See, e.g.*, *Ferreira*, 54 U.S. (13 How.) at 50. Those cases stand merely for the proposition that federal judges cannot render initial decisions on matters that are subsequently reviewed and decided by executive branch officials.

The issuance of a subpoena under § 512(h) is a ministerial function. This Court has specifically stated that "agents issuing . . . subpoenas perform ministerial acts only." *Lewis v. NLRB*, 357 U.S. 10, 15 (1958). Moreover, Congress stated expressly that it intended the issuance of DMCA subpoenas to be "a ministerial function." S. Rep. No. 105-190, at 51 (1998). Indeed, the steps required of the clerk under § 512(h) are far more ministerial in nature than other acts this Court has characterized as ministerial. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990) (calling city's duty of "review[ing] the general qualifications of each license applicant" a ministerial function); *Morrison*, 487 U.S. at 681 & n.19 (calling determination of whether "good cause" is shown for an extension of time a ministerial function). As the district court recognized, the clerk's task under § 512(h) of determining whether a subpoena request contains three required documents is clearly within this category. Pet. App. 61a.[6]

See Mistretta, 488 U.S. at 402-04 (discussing *Hayburn's Case* and *Ferreira*); *Brimson*, 154 U.S. at 480-85 (noting that the Court's holding was "not inconsistent with anything said or decided in those [*Hayburn's Case* and *Ferreira*] cases"). The Article III problem in those cases involved the issuance by federal judges of decisions that were in effect advisory opinions because they were subject to review and correction by non-Article III government officials. In *Ferriera*, the Court upheld the authority of Congress to delegate a non-judicial task to an Article III judge. The Court merely held that the federal courts lacked subject matter jurisdiction to review the decision of a federal judge acting pursuant to such authority because the decision was not a judicial act.

[5] The fact the clerk is appointed by an Article III judge does not change the analysis. Inferior officers appointed by Article III judges, such as clerks or election supervisors, may perform tasks that are non-judicial in nature and may even be unambiguously Executive in character. *See Ex parte Siebold*, 100 U.S. 371 (1879) (rejecting argument that inferior officers appointed by judges can only perform judicial functions); *Morrison*, 487 U.S. at 676 & n.13 (finding no "inherent incongruity [in] a court having the power to appoint prosecutorial officers").

Verizon wildly overshoots by claiming that § 512(h) commandeers clerks to engage in inquisitorial functions. Section 512(h) does not authorize the judiciary to spearhead investigations on its own initiative. It does not involve the clerk in proposing targets of investigation or evaluating the merits of particular claims. It gives the clerk no more investigative power than does Rule 45 or any of the other provisions authorizing clerks to issue subpoenas. Thus, the imposition of this duty on the clerk poses no "threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power . . . with the judicial power." *Mistretta*, 488 U.S. at 380-81, 393.

C. The Right to Information Established in § 512(h) Itself Supplies a Case or Controversy.

Wholly apart from the foregoing, § 512(h) is constitutional because a "case or controversy" exists where—as here—a federal statute gives a private party a right and that party seeks to enforce it in federal court. Section 512(h) does exactly that: It gives copyright owners a federal right to information from ISPs and makes that right enforceable in federal court.

Section 512(h) is thus no different from other federal statutes that create rights to obtain information (regardless of whether a separate lawsuit is pending) and that indisputably present a case or controversy when a party seeks to enforce its statutory right. For example, an ERISA beneficiary's demand for information from a plan administrator is no less backed by federal court enforcement than here. *See* 29 U.S.C. § 1132(c)(1); *see also* 5 U.S.C. § 552(a) (Freedom of Information Act).

Verizon appears to believe that there can be no case or controversy absent the filing of a complaint, but nothing in

Article III imposes that condition. The Constitution does not require "cases" or "controversies" to come in a particular form. *See Nashville, C. & St. L. Ry.*, 288 U.S. at 259 (Whether a dispute is within the bounds of the Judicial Power is a question "not with form, but with substance"); *id.* (Courts "look not to the label which the Legislature has attached to the procedure . . . or to the description of the judgment which is brought here for review, . . . but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts."). Rather, Congress has full power to define procedures that, in its view, are necessary and proper to the attainment of its legislative goals:

> [T]he Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited the judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. . . . Hence changes merely in the form or method of procedure by which federal rights are brought to final adjudication . . . are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below.

Id. at 264; *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 819 (1824) (Marshall, C.J.) ("[W]hen the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case . . .").

Pursuant to its enumerated powers, Congress has authority to create streamlined procedures, so long as they meet certain basic criteria under Article III. *Nashville, C. & St. L. Ry.*, 288 U.S. at 262-63 (fact of "modified procedure" does not determine whether case or controversy exists); *Aetna Life*, 300 U.S. at 240 (In "exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. . . . In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict."); *Fidelity Nat'l Bank & Trust Co. v. Swope*, 274 U.S. 123, 131-32 (1927). Indeed, a case or controversy can be present even where no pleadings are filed whatsoever. *See Tutun v. United States*, 270 U.S. 568, 577 (1926); *Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893) ("No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute."); *see also In re Summers*, 325 U.S. 561, 568-69 (1945) (finding case or controversy even though state supreme court held that it did not exercise its judicial power: "A claim of a present right to admission to the bar of a state and a denial of that right is a controversy.").

It makes no difference for purposes of Article III whether a copyright owner files a notification and receives a subpoena issued by the clerk, or files a complaint and receives a summons, also issued by the clerk. *See Brimson*, 154 U.S. at 486 (rejecting formalistic interpretation of Article III that would permit Congress to create a cause of action for obtaining information but prohibit Congress from authorizing subpoenas backed by judicial enforcement to achieve the same result). In either case, the copyright owner has asserted its rights in the manner prescribed by Congress.

All of the traditional requirements of a case or controversy are present here. The dispute with the ISP over the information is ripe, not moot, and neither hypothetical

nor advisory. The parties are adverse and interested, and the remedy—enforcement of a subpoena—is well within the competence of the courts. As such, a "case or controversy" is present, and Verizon's Article III challenge fails.

CONCLUSION

If the Court grants RIAA's Petition for Writ of Certiorari, RIAA has no objection to the Court granting the conditional cross-petition.

Respectfully submitted,

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August 30, 2004

Supreme Court, U.S.
FILED
SEP 14 2004
OFFICE OF THE CLERK

No. 03-1722

IN THE

Supreme Court of the United States

VERIZON INTERNET SERVICES, INC.,

Cross-Petitioner,

v.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
I. This Court Should Not Address the Statutory Issue Without Also Addressing the Alternative Ground for Affirmance Under Article III.	1
II. The Multifarious and Conflicting Article III Justifications Offered by the United States and RIAA Demonstrate that the Article III Issue Is Substantial.	2
A. RIAA's Position That the Clerk Performs Only Ministerial or Article I Functions when It Issues Subpoenas in the Court's Name Is Without Merit.	3
B. The United States' Primary Position that a Case or Controversy Exists Between Some Purported Copyright Owner and the Alleged Infringer Is Precluded by this Court's Precedent.	5
C. Neither RIAA Nor the United States Can Reconcile Its Theory with this Court's Article III Precedent.	9
Conclusion	10

TABLE OF CITED AUTHORITIES

CASES

Page

Aetna Life Insurance Co. v. Haworth,
300 U.S. 227 (1937) 7, 8

Custiss v. Georgetown & Alexandria Turnpike Co.,
10 U.S. (6 Cranch) 233 (1810) 3

Hayburn's Case,
2 U.S. (2 Dall.) 408 (1792) 10

ICC v. Brimson,
154 U.S. 447 (1894) 4

Lewis v. NLRB,
357 U.S. 10 (1958) 3

Morrison v. Olson,
487 U.S. 654 (1988) 3

Nashville, Chattanooga & St. Louis Railway v. Wallace,
288 U.S. 249 (1933) 7

United States v. Hill,
694 F.2d 258 (D.C. Cir. 1982) 4

United States v. Morton Salt,
338 U.S. 632 (1950) 4, 10

United States Catholic Conference v. Abortion Rights Mobilization, Inc.,
487 U.S. 72 (1988) 4, 10

Cited Authorities

Page

CONSTITUTION, STATUTES AND RULES

U.S. Const. amend. I 2

U.S. Const. art. III ..... *passim*

1 Stat. 90 8

17 U.S.C. § 512(h) ..... *passim*

Fed. R. Civ. P. 27 ..... 7, 8, 9

Fed. R. Civ. P. 45 5

MISCELLANEOUS

Federal Rules of Civil Procedure and Proceedings of the American Bar Institute (W. Dawson ed. 1938) 8

I. This Court Should Not Address the Statutory Issue Without Also Addressing the Alternative Ground for Affirmance Under Article III.

Contrary to RIAA's suggestion, RIAA Resp. 1, Verizon does not believe that this Court should consider the Article III question presented by these unique subpoena enforcement actions independent of the statutory interpretation question presented in RIAA's petition (No. 03-1579). Verizon's position remains that the D.C. Circuit correctly interpreted the statute and that there is no conflict and no pressing need for this Court's intervention. That is why Verizon filed a *conditional* cross-petition. Verizon thus respectfully submits that this Court should deny *both* petitions.

The United States is undoubtedly correct that where, as here, "the courts of appeals are not divided," this Court's review of RIAA's statutory interpretation question is "especially inappropriate." U.S. Opp. 9. Similarly, as the United States explains, "'[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform.'" *Id.* The D.C. Circuit thus properly avoided serious Article III and First Amendment issues by interpreting Section 512, according to its terms, not to apply where the Internet service provider performs a mere conduit function. Opp. 25-30. This principle of constitutional avoidance, which governs this Court as much as lower courts, is one reason that this Court, if it grants review on the statutory question, should also review the Article III question (which might shape the statutory resolution).[1]

If this Court grants RIAA's petition on the statutory interpretation question, *despite* the fact that it meets none of the traditional criteria for review, it should also consider the alternative Article III ground for affirmance. On this point, RIAA agrees with Verizon:

> [B]ecause both RIAA's interests and those of the public would be served by a conclusive resolution

1. The doctrine of constitutional avoidance does not, as the United States would have it, U.S. Opp. 9-10, counsel this Court to refer constitutional issues to another court where those issues *cannot* be avoided. It is an interpretive device applicable in *every* federal court, not a principle of organization as *between* this Court and the lower appellate courts.

> of all of Verizon's potential objections to § 512(h), and because Verizon could raise the issue as an alternative ground for affirmance if RIAA's petition is granted, RIAA has no objection to this Court considering the Article III issue in conjunction with the question presented in RIAA's petition.

RIAA Resp. 1.

While the United States disagrees with this position, it cannot dispute that: i) the Article III issue was briefed by all three parties and fully argued below; ii) the district court decided the issue in a lengthy decision; iii) the issue has been raised in every DMCA subpoena proceeding to date; and iv) certainty regarding the legal status and enforceability of these unique subpoenas cannot be obtained until the question of Article III power to issue and enforce them has been resolved.[2] Verizon thus submits, and RIAA concurs, that this Court should not grant RIAA's petition without also considering the alternative Article III ground for affirmance.

II. The Multifarious and Conflicting Article III Justifications Offered by the United States and RIAA Demonstrate that the Article III Issue Is Substantial.

After over two years, many rounds of briefing, and two hearings below on the Article III issue, RIAA and the United States continue to disagree over what constitutional powers are being exercised here and under what "theory" these subpoenas can fit within the judicial role in particular and our scheme of separation of powers in general. Although none of the theories proffered by RIAA or the United States saves the DMCA's novel subpoena provision from Article III infirmities, the very fact that RIAA and the United States so fundamentally disagree on the nature of the provision and its import for Article III purposes only underscores the need for this Court's resolution of the serious Article III question at issue: whether

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2. The United States suggests that even if this Court were to consider the Article III issue, the validity of RIAA's subpoenas could not be definitively resolved because there remains an outstanding First Amendment issue that Verizon has not properly placed before this Court. U.S. Opp. 10-11. Apparently, the United States ignored the extensive discussion of the First Amendment in Verizon's opposition to RIAA's petition. Opp. 25-27.

the issuance and enforcement of binding judicial process pursuant to 17 U.S.C. § 512(h), outside the context of a "case or controversy," violates Article III of the United States Constitution and constitutionally mandated separation of powers principles.

A. RIAA's Position That the Clerk Performs Only Ministerial or Article I Functions when It Issues Subpoenas in the Court's Name Is Without Merit.

RIAA now fully embraces the district court's theories that the clerk's issuance of a DMCA subpoena is either a "ministerial" act or an exercise of delegated Article I authority and for those reasons does not implicate Article III, Pet. 61a-62a. RIAA Resp. 8-15. Although the United States acknowledges this holding in a footnote, U.S. Opp. 13 n.2, it does not embrace this position. On the contrary, the United States concedes that, "the issuance of subpoenas has long been a routine responsibility of federal courts, and can fairly be characterized as a duty 'of a *judicial* nature.'" *Id.* at 18 (emphasis added).

As the United States concedes, the issuance of any subpoena in the name of the court backed by Article III enforcement power is a judicial act. *Id.* at 13 n.2 ("[T]raditional subpoenas are ordinarily regarded as judicial orders (even if issued, as here, without direct judicial involvement). . . ."); Cross-Pet. 17 & n.11. Such judicial orders carry with them the full enforcement power of the court the moment they are issued, subjecting the recipients to "contempt of court" if they refuse to answer. U.S. Opp. 13 n.2. Thus, DMCA subpoenas undoubtedly invoke judicial power under Article III.

None of the cases RIAA cites for the proposition that the issuance of a DMCA subpoena is "ministerial" involves the issuance of a writ of subpoena by the clerk of a federal court carrying the full enforcement power of the federal courts, RIAA Resp. 13-14. *See, e.g., Custiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. (6 Cranch) 233, 237 (1810) (recordation of condemnation verdict where "[t]he law asks not the intervention of the court"); *Lewis v. NLRB*, 357 U.S. 10, 14-15 (1958) (issuance of subpoenas by regional director of the NLRB); *Morrison v. Olson*, 487 U.S. 654, 681 & n.19 (1988) (decision regarding extension of time "ministerial").

Nor is RIAA aided by cases examining the authority of non-Article III actors to issue subpoenas. RIAA Resp. 8-11 (also citing statutes under which non-Article III actors may issue subpoenas). The power of executive agencies to issue administrative subpoenas comes both from their Article II authority to "take Care that the Laws be faithfully executed" and their Article I authority delegated by Congress.

For example, *ICC v. Brimson*, 154 U.S. 447 (1894), relied upon heavily by RIAA, RIAA Resp. 9-10, involved the exercise of judicial power to enforce administrative subpoenas issued by the ICC after a refusal to comply. Because a live case or controversy over federal questions under the Interstate Commerce Act existed at the time judicial enforcement was sought, the Court held that the statute did not require the federal courts to act outside of Article III. 154 U.S. at 485. A federal agency was asking a federal court to decide a question of federal law—*i.e.*, the limits of agency authority to investigate and compel parties to produce evidence in administrative investigations. Nothing in *Brimson* or its progeny suggests that Congress could have authorized the *federal courts* to issue and enforce subpoenas to investigate possible violations of the Interstate Commerce Act. *See United States v. Hill*, 694 F.2d 258, 263 (D.C. Cir. 1982) ("At least since *ICC v. Brimson* . . . , federal courts have drawn a sharp distinction between agency power to *issue* subpoenas and judicial power to *enforce* them.").

This Court's subsequent decisions in *United States v. Morton Salt*, 338 U.S. 632 (1950), and *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), preclude entirely RIAA's misapplication of *Brimson* and make clear that courts may not conduct investigations into possible civil or criminal wrongdoing in the same manner as administrative agencies. Cross-Pet. 15-16. Federal courts are constrained by Article III to adjudicate only live cases or controversies pending before them, and not even RIAA suggests that Congress could, for example, authorize the adjudication of moot causes or causes that are not ripe for review. Yet under RIAA's theory, Congress could authorize clerks of the federal courts to issue judicially enforceable

subpoenas in moot proceedings or where the underlying dispute is not ripe or could not otherwise be brought in federal court. RIAA Resp. 9 n.2 (arguing that no "case or controversy [is necessary] at the time of issuance"). It makes no sense to say that advisory opinions are forbidden, but that the judiciary can use its tools of investigation outside the presence of any concrete dispute over federal law that could lead to an opinion. It is unsurprising that RIAA can cite no authority to support this end-run around Article III and that the United States refuses to endorse it.

Finally, RIAA itself acknowledges that even if issuance of a DMCA subpoena could otherwise properly be characterized as a "ministerial" or non-judicial function, such a delegation runs afoul of Article III and separation of powers principles if it "aggrandizes the authority of the judiciary []or interferes with its operation." *Id.* at 12-13. RIAA nonetheless ignores the interference its *own* DMCA subpoena requests caused the federal courts during the brief period it was permitted to seek issuance of DMCA subpoenas. Cross-Pet. 22-23.

RIAA obtained thousands of subpoenas that forced at least one clerk's office to reassign resources and employees away from legitimate judicial tasks to perform what RIAA terms "ministerial" or delegated Article I powers. If RIAA is correct that issuance of DMCA subpoenas is an Article I function, then diversion of substantial court resources to perform that function, regardless of how much it *resembles* the traditional judicial function under Federal Rule of Civil Procedure 45, RIAA Resp. 15, clearly aggrandizes the authority of the judiciary and interferes with its judicial operation in violation of constitutional separation of powers principles.

B. The United States' Primary Position that a Case or Controversy Exists Between Some Purported Copyright Owner and the Alleged Infringer Is Precluded by this Court's Precedent.

The United States wisely concedes that "the issuance of a subpoena under Section 512(h) . . . involves an exercise of Article III *judicial power*," U.S. Opp. 13 n.2 (emphasis added), and stakes its defense of the DMCA subpoena provision on the theory that there exists a hypothetical case or controversy

between the purported copyright owner and the alleged infringer at the time the subpoena is issued. *Id.* at 12-13. Under the United States' reasoning, because there may be a controversy that *could be* brought in federal court (namely, a copyright infringement action), the judicial subpoena process *can be* invoked. *Id.*; *see also* RIAA Resp. 4-8. Such a *hypothetical* case or controversy has never been found to justify invocation of the Article III powers of a federal court. A case or controversy must be *brought* in the federal court seeking recognized judicial relief in order to invoke the court's jurisdiction.[3]

As applied by RIAA here, Section 512(h) permits purported copyright owners or their agents to invoke the federal judicial power without bringing that infringement action in federal court. Try as the United States might to equate the DMCA application process with the filing of an infringement action, they are fundamentally different, as the former is the mere request for judicial *process* (fact-gathering) and the latter is a request for judicial *relief* (injunctive or otherwise to remedy infringement).[4]

As Verizon explained in its cross-petition and the United States does not address, the DMCA subpoena requester does not place *any* issue of federal law before the district court. Cross-Pet. 10. Section 512(h) thus takes an investigative tool

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3. The United States does not endorse RIAA's last-resort argument that Section 512(h) confers on the subpoena requester an enforceable federal right to information from the Internet service provider such that there is an actual case or controversy between the requester and the Internet service provider. RIAA Resp. 15-18; *id.* at 9 n.2. RIAA's theory that Section 512(h) can be analogized to federal statutory causes of action seeking information, such as those found in ERISA or FOIA, was flatly rejected by the district court, Pet. 74a n.12, and for good reason. Section 512(h) does not itself create a private right of action, and the mere curiosity or desire for information held by the Internet service provider is no more a "case or controversy" than any *ex parte* discovery request made in federal court.

4. The United States asserts that "[a] party seeking a subpoena under Section 512(h) thus must set forth the *functional equivalent* of a *prima facie* claim of copyright infringement," U.S. Opp. 13 (emphasis added), and ignores entirely the facts that a person seeking information pursuant to Section 512(h) need not aver each element of an infringement action or even state a cause of action and need not even be a potential *party* to an infringement suit (RIAA, for example, cannot bring infringement actions on behalf of its copyright owner members.). Cross-Pet. 9-10.

that is proper when used in the context of an actual case or controversy (the third-party subpoena) and disconnects it from its only constitutionally sanctioned use—the development of facts to aid in the resolution of a live case of federal law between adverse parties. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) ("[The controversy] must be a real and substantial controversy admitting of a specific relief through a decree of conclusive character . . . .").

Even where this Court has recognized that there is some flexibility in the form of the vehicle through which a case or controversy may be brought in federal court, U.S. Opp. 12-13; RIAA Resp. 8, it has never suggested that judicial process can be invoked outside of an actual pending case or controversy. Thus, even in the declaratory judgment context, at the outer edge of federal court jurisdiction, there must be an active case or controversy between adverse parties before the court and an issue of federal law to be decided. *See Aetna Life*, 300 U.S. at 241 ("Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised" in a declaratory judgment action.); *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933) (upholding declaratory judgment action where "case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment"). The DMCA subpoena, by contrast, is an *ex parte* request to gather facts that likely will never see the inside of a federal courtroom for any purpose. RIAA has taken this position, arguing that under the DMCA, it is entitled to judicial process without any expectation that it will be a party to a federal lawsuit and without seeking any judicial relief as to the claimed infringement.

RIAA invokes Federal Rule of Civil Procedure 27 to support its assertion that "[a]ll that is required is the existence of a *controversy* cognizable in federal court, not the existence of a pending *case*." RIAA Resp. 4-8 (emphases added). No such distinction between the constitutional terms "case" and "controversies" exists such that the word "controversy" can

be read to describe an ethereal dispute not yet brought into federal court. On the contrary, this Court has clarified that "[t]he term 'controversies,' if distinguishable at all from 'cases,' is so in that it is *less* comprehensive than the latter, and includes only suits of a civil nature." *Aetna Life*, 300 U.S. at 229.

Moreover, the attempt to equate Section 512(h) and Rule 27 fails miserably. First, both RIAA and the United States suggest that the close connection between Rule 27 and an actual case or controversy is somehow weakened by the fact that a would-be *defendant* may invoke the rule. U.S. Opp. 15-16; RIAA Resp. 6. The point for purposes of Article III is that under Rule 27, the party seeking to perpetuate known evidence must aver that it expects to be *a* party to an actual case or controversy brought in federal court.[5] Under Section 512(h), the subpoena requester may have no ability ever to be a party (plaintiff *or* defendant) to an actual infringement action and need not have any expectation of being a party to such a suit.

Second, both RIAA and the United States assert that the nature of the DMCA subpoena as a mere discovery tool, divorced from any need to perpetuate testimony to be used in an actual federal lawsuit, is irrelevant under Article III. U.S. Opp. 16; RIAA Resp. 6-7. They also claim that there is no Article III import to the absence of any adversarial process before a

5. RIAA misreads the historical antecedent to Rule 27 as requiring no connection to an actual case or controversy. RIAA Resp. 6. In fact, Congress in 1789 merely clarified that the Judiciary Act did not affect the ability of litigants to take depositions "in *perpetuam rei memoriam*" as long as the underlying matter could be brought in federal court. 1 Stat. 90 (Sec. 30). It thus made clear only that no such depositions could be taken where the matter was *not* "cognizable in any court of the United States," and did not broaden such pre-suit depositions to permit discovery where it was not necessary to perpetuate testimony or where the suit may never be brought. *Id.* Thus, when the Advisory Committee discussed the creation of Rule 27 itself, it made clear that the rule was limited to traditional and "ordinary cases of perpetuation of evidence," where

> the court has to make an order saying that there shall be no examination unless necessary to prevent a failure or delay of justice, and in reaching that conclusion he considered all of these facts stated in the petition, that you cannot bring your suit, that your witness is likely to die, and all that sort of thing.

Federal Rules of Civil Procedure and Proceedings of the American Bar Institute 292-93 (W. Dawson ed. 1938).

DMCA subpoena may issue. U.S. Opp. 16-17; RIAA Resp. 7. But the presence of adversarial parties, who seek resolution of some issue of federal law and request some form of judicial relief based upon that resolution, *are* the essential components of a constitutional "case or controversy." Section 512(h) possesses none of these essentials, not to mention its utter lack of historical pedigree compared to suits to preserve testimony.

Finally, RIAA posits that Rule 27 is *less* connected to an actual case or controversy than is the DMCA subpoena process, presumably because Section 512(h) is limited to allegations of copyright infringement whereas Rule 27 applies to any federal cause of action. RIAA Resp. 5. It is not the scope of the federal rights that *could be brought* in federal court that creates the Article III problem for the DMCA discovery device; rather, it is the fact that the subpoena requester may invoke the judicial process to obtain information for purposes wholly divorced from an actual case or controversy.[6]

C. Neither RIAA Nor the United States Can Reconcile Its Theory with this Court's Article III Precedent.

With no single coherent theory for why Section 512(h) withstands Article III scrutiny, both the United States and RIAA understandably run from this Court's precedents that outline the essential attributes of a case or controversy. Thus, buried at the end of the United States' brief (pp. 18-19) and in a single paragraph and footnote in RIAA's brief (p. 11 & n.5) are both parties' attempts to sweep aside this precedent. These cursory attempts fail.

Both the United States and RIAA try to distinguish a series of opinions dating back to 1792 as addressing only the invalidity of advisory opinions. U.S. Opp. 18; RIAA Resp. 13 n.5. They miss the point. It is true, of course, that from the Framers' time to the present, this Court has consistently held that Article III forbids the use of the federal courts as free floating *advisory* bodies to *issue decisions* unconnected to the

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6. The handful of statutes that both the United States and RIAA claim are analogous to Section 512(h) are readily distinguishable. U.S. Opp. 17-18; RIAA Resp. 10-11. None of these statutes allows a private party to use a judicially issued and enforced writ of subpoena to gather evidence that the party is then free to use for any non-adjudicatory purpose it chooses.

adjudication of actual cases or controversies. It is equally true, however, that this precedent precludes the use of the federal courts as free floating *investigative* bodies to *discover facts* unconnected to the adjudication of actual cases or controversies. Cross-Pet. 15 (citing cases). In effect, both the United States and RIAA are arguing that a federal court could issue *judicial process* unconnected to adjudication of an actual case or controversy where it could not otherwise issue a *judicial decision*. This reasoning defies logic and is directly foreclosed by *Morton Salt* and *Catholic Conference*, which made explicit that the Article III limitations on federal courts' authority to issue subpoenas are as binding as the limitations contained in the Bill of Rights. Cross-Pet. 15-16.

The United States' and RIAA's *only* answer to these established precedents, which date back to *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), is that here a statute specifically authorizes the use of Article III power outside a case or controversy. U.S. Opp. 19; RIAA Resp. 11. This is confession as defense. *Morton Salt* spoke not of congressional authorization but of "limitations inherent in the body that issues . . . [subpoenas] because of the provisions of the Judiciary Article of the Constitution," 338 U.S. at 642, and both *Morton Salt* and *Catholic Conference* found the limitations of Article III analogous to those contained in the Bill of Rights, *Catholic Conference*, 487 U.S. at 76 (quoting *Morton Salt*, 338 U.S. at 642). If the principles that run from *Hayburn's Case* to *Catholic Conference* are to be modified or overruled, that decision should come from this Court.

CONCLUSION

For the foregoing reasons and those enumerated in Verizon's conditional cross-petition, Verizon respectfully submits that if this Court grants RIAA's petition in No. 03-1579, it should also grant Verizon's conditional cross-petition.

Respectfully submitted.

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